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CASES DETERMINED
BY THE
ST. LOUIS, KANSAS CITY AND SPRINGFIELD
COURTS OF APPEALS
OF THE
STATE OF MISSOURI,

REPORTED FOR THE
ST. LOUIS COURT OF APPEALS
November 10, 1910, to December 30, 1910.
By THOMAS E. FRANCIS of the St. Louis Bar,

FOR THE
KANSAS CITY COURT OF APPEALS
January 16, 1911, to February 13, 1911.
By JOHN M. CLEARY of the Kansas City Bar,

AND FOR THE
SPRINGFIELD COURT OF APPEALS
February 6, 1911.
By LEWIS LUSTER of the Springfield Bar,

OFFICIAL REPORTERS.

VOL. 153.

COLUMBIA, MO.
E. W. STEPHENS, PUBLISHER,
1911.

1 2022

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HON. RICHARD L. GOODE, }
HON. ALBERT D. NORTON, } *Judges.*

JOSEPH FLORY, *Clerk.*

THOMAS E. FRANCIS, *Reporter.*

JUDGES OF THE KANSAS CITY COURT OF APPEALS.

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HON. JAMES ELLISON, }
HON. JAMES M. JOHNSON, } *Judges.*

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JUDGES OF THE SPRINGFIELD COURT OF APPEALS.

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HON. ARGUS COX, }
HON. HOWARD GRAY, } *Judges.*

H. H. MITCHELL, *Clerk.*

LEWIS LUSTER, *Reporter.*

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CASES DETERMINED

BY THE

ST. LOUIS, KANSAS CITY AND SPRINGFIELD

COURTS OF APPEALS

AT THE

OCTOBER TERM, 1910.

(Continued from Volume 152)

**OLGA VOELKER, Respondent, v. HILL-O'MEARA
CONSTRUCTION COMPANY, Appellant.**

St. Louis Court of Appeals, November 10, 1910.

1. **DEATH: Negligence: Evidence: Causal Connection: How Established.** While, in an action for death resulting from negligence, it is necessary for plaintiff to not only prove negligence but that decedent's death resulted therefrom, and that the causal connection be established by the evidence and not rest upon speculation and conjecture, still it is sufficient if the facts proved are of such nature and are so connected and related to each other that the causal connection may be fairly inferred from them.
2. ———: ———: **Falling into Unguarded Excavation: Evidence: Statements of Deceased: Right of Jury to Disregard.** In an action for death resulting from decedent's falling into an unlighted and unguarded excavation, the jury were justified in attributing a statement made by decedent to persons who found him in the excavation that he had been shot and thrown into the excavation, when an examination of his body disclosed that he had not been shot, to a disordered condition of his mind, due to his injury.

3. ———: ———: ———: ———: **Presumptions.** In an action for death resulting from decedent's falling into an unlighted and unguarded excavation, the law presumes decedent did not commit suicide, and if the surroundings did not indicate how he came to be in the excavation, the presumption is that it was without design.
4. **EVIDENCE: Motives, Feelings and Instincts.** In all cases touching the conduct of men, motives, feelings and natural instincts are allowed to have their weight and to constitute evidence for the consideration of courts and juries.
5. **DEATH: Negligence: Falling into Unguarded Excavation: Sufficiency of Evidence.** In an action against a contractor, who excavated in a street in the space reserved for the sidewalk and who failed to erect barriers or maintain warning lights, as required by a city ordinance, for the death of a pedestrian who fell into the excavation, evidence held to justify a finding that decedent met his death by falling into the excavation while walking on the street and that the negligence of defendant in failing to guard the excavation and maintain warning lights thereat was the proximate cause of decedent's death.
6. **DAMAGES: Instructions: Correct in General Scope: Necessity of Asking Limiting Instruction.** An instruction on the measure of damages is not erroneous because general, if it is correct as far as it goes, and a party desiring a more specific instruction must request it in proper form.
7. **DEATH: Action by Wife: Damages: Instructions.** In an action by a wife for the negligent death of her husband, an instruction that the jury may assess her damages at such sum as they believe will compensate her for her husband's death, not exceeding a specified sum, is sufficient, in the absence of a request for a more specific instruction.
8. **INSTRUCTIONS: Refusal.** Where unsound principles of law are incorporated in a requested instruction, it is not error to refuse it or to fail to give a correct instruction.
9. **DEATH: Action by Wife: Damages: Elements of Damages: Instructions.** In an action by a wife for the death of her husband, resulting from negligence, it is not necessary for plaintiff to prove what the earnings of decedent were, to avoid being limited to nominal damages, since the personal attention of her husband to insure her comfort and the many ways in which he might make himself helpful and useful to her should be taken into consideration in measuring her loss; and for such loss she is entitled to substantial damages, without any showing as to decedent's earnings.

10. ———: ———: ———: ———: **Loss of Society.** In an action by a wife for the death of her husband, resulting from negligence, the wife is not entitled to recover for loss of her husband's society.
11. ———: ———: ———: ———: **Evidence: Presumptions: Instructions.** In an action by a wife for the death of her husband, resulting from negligence, the law presumes that decedent was industrious and sober, treated his family tenderly and properly, and contributed sufficiently toward their support, so that a requested instruction limiting plaintiff's recovery to nominal damages, if the jury believed plaintiff failed to prove decedent had performed such duties, was properly refused.
12. ———: ———: ———: ———: **Failure of Husband to Perform Duties.** In an action by a wife for the death of her husband, resulting from negligence, although the husband had not performed the duties of treating his family tenderly and properly and contributing sufficiently toward their support, the wife had a right to the performance of such duties by the husband, and her recovery is not to be limited to nominal damages where that right is negligently destroyed.
13. ———: ———: ———: ———: **A wife suing for the death of her husband, resulting from negligence, may recover for the loss of the personal attention and usefulness of her husband, and for having to assume the burden of a father's care in the education and support of minor children of the marriage, without showing his fortune, earnings, or capacity to earn, or his habits, or treatment of his family, and without showing, to any degree of exactness, his age or the state of his health.**
14. ———: ———: ———: **Discretion of Jury.** In an action by a wife for the death of her husband, resulting from negligence, the award of damages is largely, if not altogether, conjectural, not subject to even approximate admeasurement, and juries are not confined to any exact mathematical calculation, but are vested with considerable discretion, with which the courts will not interfere, unless it has been abused.
15. ———: ———: ———: **Excessive Verdict.** In an action by a wife for the death of her husband, resulting from negligence, the evidence showed that decedent was employed as agent for an insurance company; that he had a child ten years old and another child whose age was not stated. *Held*, that while the age and state of health of decedent could not be accurately inferred, still it might be inferred he was not extremely old or seriously disabled and had some degree of life expectancy, and that a verdict for \$3500 was not so large as to shock the sense of justice, although the life expectancy of deceased might not appear to be very great.

16. **APPELLATE PRACTICE: Questions Reviewable: Abstract.** The court, on appeal, will not pass upon a contention that an instruction is erroneous as going beyond the duties imposed by an ordinance, where appellant failed to set out the ordinance in his abstract.
17. ———: **Dismissal as to Co-defendants: Right to Complain.** A defendant against whom a judgment is rendered in an action for negligent death may not complain because the cause was, at the close of plaintiff's evidence, dismissed as to co-defendants.
18. **INSTRUCTIONS: Refusal: Covered by Other Instructions.** It is not error to refuse a requested instruction embodied in instructions given by the court of its own motion.
19. **DEATH: Negligence: Contributory Negligence: Intoxication of Decedent: Instructions.** An instruction, in an action for the death of a person falling into an unguarded excavation in a sidewalk, that if decedent directly contributed to his death by his own negligence there could be no recovery, and that if he fell into the excavation while intoxicated and the intoxication directly contributed to the accident and the injury would not have occurred but for the intoxication, the verdict must be for defendant, properly submitted the issue of contributory negligence.

Appeal from St. Louis City Circuit Court.—*Hon. Hugo Muench*, Judge.

AFFIRMED.

Collins & Chappell for appellant.

(1) There was no evidence to sustain the verdict. *Stepp v. Railroad*, 85 Mo. 229; *Brown v. Railroad*, 20 Mo. App. 222; *Christy v. Hughes*, 24 Mo. App. 275; *Saxton v. Railroad*, 98 Mo. App. 494. (2) The instructions given by the court as to the measure of damages are erroneous. *Coleman v. Land Co.*, 105 Mo. App. 254; *McGowan v. Ore & Steel Co.*, 109 Mo. 518.

Phil H. Sheridan, *A. R. Taylor* and *Henry B. Davis* for respondent.

(1) There was plenty of evidence to sustain the verdict. *Buesching v. St. Louis Gas Light Co.*, 73 Mo. 219; *McKenzie v. Railroad*, 216 Mo. 22; *Youngue v. Railroad*, 133 Mo. App. 141. (2) The appellant can-

not object to the instruction as to the measure of damages on the ground that it is too general, where it did not ask for a more specific instruction. *Simpson v. Ball*, 129 S. W. 1017; *Taylor v. Iron Co.*, 133 Mo. 349; *Barth v. Railroad*, 142 Mo. 535; *Browning v. Railroad*, 124 Mo. 55; *Browning v. Railroad*, 124 Mo. 72; *Boettger v. Iron Works*, 124 Mo. 87; *Geismann v. Missouri-Edison Co.*, 173 Mo. 654; *Sharp v. Biscuit Co.*, 179 Mo. 553; *Fisher v. St. Louis Transit Co.*, 198 Mo. 562. (3) The verdict of the jury is not excessive. *Sharp v. Biscuit Co.*, 179 Mo. 553. (4) The prejudicial error claimed did not result to the defendant's injury by plaintiff making parties of a large number of persons in interest in this litigation and their resulting dismissal at the close of plaintiff's evidence. *Moudy v. Dressed Beef & Provision Co.*, 130 S. W. 476.

STATEMENT.—This was an action against the Hill-O'Meara Construction Company, the general contractor erecting a building on Locust street in the city of St. Louis, for negligence in not guarding an excavation in the sidewalk in front of said building, and in not displaying and maintaining red lights as required by ordinance, it being alleged that plaintiff's husband was killed by falling into said excavation on or about March 1, 1907. The building in question occupied the entire west half of the block fronting on Locust, Tenth and Olive streets. On the night in question the outside walls of the building had been finished up to the tenth story, except that the first or ground-floor story was not inclosed with brick but was entirely open from Olive to Locust street between the steel columns supporting the building. The floor of the first story inside the building had been completed. But it was planned that the basement was to extend outside the building line to the curb line of Locust street, and for this purpose the entire sidewalk on Locust street, from the alley on the east to Tenth street on the west, some one

hundred and fifty feet, and the earth thereunder, had been removed and excavated by defendant to a depth of some fourteen feet, and a retaining wall one hundred and fifty feet long had been built at the outer curb edge of the excavation but not above it. Steel girders or beams had been laid across the top of the excavation from the building to the retaining wall for the purpose of supporting a concrete sidewalk, but the concrete had not been placed between them, and the entire excavation lay open, except for a few boards thrown across the beams near the building. There were no boards near the curb. A line of cinder piles extended from the alley up to near Tenth street and close to the outer edge of the excavation, the said cinder piles being from one to two feet high and the cinders being for use in concreting.

At about half past two o'clock in the morning of March 2, 1907, after the building had been deserted and was in darkness, two police officers and the night watchman of the building, being attracted thereto by a noise, found plaintiff's husband at the bottom of the excavation, close by the retaining wall and about twenty feet west of the alley, lying across a large wooden roller. His back was broken.

Plaintiff's evidence tended to show that there was no barrier, fence, guard or warning light around or near the excavation or cinder piles for the entire distance between the alley and Tenth street. All along the curb line, for one hundred and fifty feet, the excavation was unguarded.

The testimony of the police officers was to the effect that when the man was found he moaned and said he was shot, and asked who had put him there; that there was no smell of liquor about the man and nothing to indicate whether he was drunk or sober; but that at the dispensary, and the next morning at the hospital, and while, according to the police officers, he was rational, he said that he had had a glass or two of wine

out on Gravois Road during the day; could not stand much and had drunk more than he ought to; had come down town on a Cherokee car and had gotten off at Ninth and Pine streets to go to a toilet. As a matter of fact the man was not shot, and no one saw him fall into the excavation. The police searched his clothes at the dispensary and found five memorandum books, \$16.47 in a purse, a nickel-plated watch and a pair of eye glasses. The man died at the city hospital from his injuries.

The only evidence concerning the relationship of plaintiff and deceased, his employment, family and domestic life was the testimony of plaintiff herself, as follows:

"I live in the city of St. Louis. F. H. G. Voelker was my husband. We were married in 1881. I lived with him up to the time of his death. He met with the accident March 1st, and died March 3d, 1907. He was agent for the Prudential Insurance Company.

"When my husband F. H. G. Voelker, died, he left surviving him a minor child, ten years old, still living."

It was later admitted in the case that plaintiff had two minor children when her husband died; a boy and a girl.

The instructions given and refused are set forth or appropriately mentioned in the opinion proper.

There was a verdict and judgment for plaintiff for \$3500, from which defendant has prosecuted this appeal.

CAULFIELD, J. (after stating the facts).—1. Appellant first contends that there was no evidence to sustain the verdict. There was ample evidence to justify the jury in finding that the defendant's duty of guarding the excavation and maintaining warning lights was broken. But it is insisted the evidence failed to show any causal relation between the negligence thus properly found and the injury which resulted in the

death of plaintiff's husband. It is true, as asserted by defendant's counsel, that plaintiff was bound to prove not only the negligence, but that her husband met his death by reason thereof, and this causal connection must be proved by evidence, as a fact, and not be left to mere speculation and conjecture. The rule does not require, however, that there must be direct proof of the fact itself. It is sufficient if the facts proved are of such a nature and are so connected and related to each other that the conclusion therefrom may be fairly inferred. [Settle v. Railroad, 127 Mo. 336, 341, 30 S. W. 125.] It is an undisputed fact that plaintiff's husband was found at the bottom of the excavation with his back broken, and no witness saw him fall. Over him the excavation was entirely open. He was close to the Locust street curb line, lying upon his back across a large wooden roller. His position and condition thus shown were sufficient to justify the inference that he was precipitated into the excavation and broke his back by striking the roller. He stated to the officers who found him that he had been shot and thrown into the excavation, but an examination of his body disclosed that he had not been shot. The jury were justified in attributing these statements to a disordered condition of mind due to the man's terrible injury. They were fortified in this by the fact that his watch, money and papers were upon his person when he was found, and there were no marks of violence visible except those palpably due to his fall. We think it a fair and reasonable inference from the surroundings and condition of the deceased when found, that he was not murdered. There is no presumption of law that deceased committed suicide, and if his surroundings when found do not indicate how he came to be there, the presumption is that it was without design. [Buesching v. Gas Light Co., 73 Mo. 219, 230.]

Defendant insists that the evidence justifies the inference that the deceased walked through the build-

ing from Olive street seeking a toilet, and emerging on the Locust street side, walked out on some loose boards over the excavation until he reached a point near the Locust street curb, and there he fell in; and that this inference is more logical than that the deceased fell in while walking on Locust street, because the evidence shows the deceased got off a street car at Ninth and Pine streets to go to a toilet and had to pass Olive street in order to get to the excavation. Assuming this, defendant's counsel argues that barriers and lights around the outer edges of the excavation would not have prevented the accident. It is possible that the inference thus insisted upon might fairly be drawn by the jury. But the question we have to deal with here is whether there was evidence from which the jury could reasonably conclude the deceased fell in from the Locust street curb side. To say the least, it was more logical to infer that the deceased walked to the excavation along public streets where there were street lamps and where people usually walk, than that he committed a trespass and voluntarily chose to walk through a long dark building in the course of construction, between two and three o'clock in the morning. "In all questions touching the conduct of men, motives, feelings and natural instincts are allowed to have their weight and to constitute evidence for the consideration of courts and juries." [Johnston v. Railroad, 130 S. W. 413.] Defendant suggests that the cinders formed a barrier to the excavation. On the contrary it was logical for the jury to infer from the evidence that the deceased stumbled over them into the excavation and thereby they aided in his fall. We conclude that there was sufficient evidence to connect the injury of plaintiff's husband with the negligence of defendant.

2. Defendant insists that the instructions were erroneous in respect to the measure of damages. Plaintiff's first instruction authorized the jury "to assess her damages at such sum as the jury believes from the

evidence will compensate plaintiff for the death of her husband, the verdict not to exceed the sum of \$5000." The second instruction contains the same direction. Defendant argues that this language is entirely too general and relies upon *Coleman v. Land Co.*, 105 Mo. App. 254, 79 S. W. 981, and *McGowan v. Ore & Steel Co.*, 109 Mo. 518, 19 S. W. 199. The latter case "is authority for the point suggested, but it has not been followed by the Supreme Court in later cases." [*Dunn v. North-east, etc., Co.*, 81 Mo. App. 42, 45.] In the other case (*Coleman v. Land Co.*), which was a suit by the parents for the negligent killing of a minor son, the fault of the instruction appears to have been that it was broad enough to authorize a recovery for the loss of the minor's services after he had become of age. It was a case of misdirection and not of nondirection. But be that as it may, it is now established that an instruction is not to be held erroneous because general in the directions relating to the measure of damages if it is correct as far as it goes. [*Browning v. Railroad*, 124 Mo. 55, 71, 27 S. W. 644.] The instruction under consideration here limits the jury's consideration to the injuries shown by the evidence and it is not suggested that there was evidence of anything not properly entering as an element into the measure of damages. We deem it similar in every essential feature to the one approved by the Supreme Court in the case of *Browning v. Railroad*, *supra*.

If defendant desired a more specific instruction on the measure of damages, it should have asked for it in proper form. [*Simpson v. Ball*, 129 S. W. 1017.] In this connection defendant suggests that it did ask, and the court refused, two instructions limiting the verdict to nominal damages, and contends such refusal was error. We will pass upon said refused instructions in their proper place in this opinion. Suffice to say here, that if unsound principles of law have been incorporated in them by the defendant it was not error in

the circuit court to refuse them or to fail to give a correct instruction of its own motion. [Barth v. Railroad, 142 Mo. 535, 556, 44 S. W. 778.]

Defendant furthermore suggests that in the cases approving general instructions, the evidence contained sufficient elements to enable the jury, without conjecture, to estimate the damages, while the evidence in the case at bar contained no such elements. That suggestion will be met in our discussion of the second instruction for nominal damages offered by defendant.

3. The defendant complains that the court erred in refusing an instruction, the pertinent part of which is as follows:

"The burden is upon the plaintiff to establish the amount of her pecuniary damages resulting from the death of F. H. G. Voelker, and you are instructed that if the evidence fails to show the earning capacity of the deceased, his habits of industry or sobriety, his treatment of his family, or whether he ever contributed anything to the support of his family, then you will assess the damages, if you find in favor of the plaintiff, at no more than a nominal amount."

The court would have erred had it given such an instruction. It was not necessary for the plaintiff to prove what the earnings of the deceased were to avoid being limited to nominal damages. [Haines v. Pearson, 107 Mo. App. 481, 485, 81 S. W. 645; Stohrer v. Railroad, 91 Mo. 509, 518, 4 S. W. 389; Sipple v. Gas Light Co., 125 Mo. App. 81, 95, 102 S. W. 608.] Aside from his society, which she is not entitled to recover for, (Knight v. Lead & Zinc Co., 75 Mo. App. 541, 550), and aside from his support, the plaintiff had other property rights in the life of her husband. The personal attention of the husband to insure her comfort and the many ways he might make himself helpful and useful to her, should be taken into consideration in measuring her loss. For this loss she was entitled to substantial damages without any showing as to his

earnings. As the instruction ignored this element of damage, it was properly refused. The instruction was further erroneous in that it limited the plaintiff to nominal damages unless she showed her deceased husband's "habits of industry or sobriety, his treatment of his family and whether he ever contributed anything to the support of his family." If the evidence failed to show these things, then the law presumes that the deceased was industrious and sober, treated his family tenderly and properly, and contributed sufficiently toward their support. The law in this, as in other instances, presumes that duty will be performed. [Brunke v. Telephone Co., 112 Mo. App. 623, 628, 87 S. W. 84.] And even if he had not theretofore performed such duties, she had a right to such performance, and is not to be limited to merely nominal damages for the negligent destruction of that right. [Sedgwick on Damages (8 Ed.), sec. 578.]

4. The defendant next complains that the court refused to instruct the jury that under the evidence adduced the damages could not exceed a nominal amount; also that the verdict is excessive. These contentions rest upon the theory that the evidence does not disclose any basis for the jury to build upon in estimating plaintiff's damages. We cannot agree with defendant. Its theory is not borne out by the fact. Plaintiff might recover for the loss of the personal attention, helpfulness and usefulness of her husband, and for having to assume the burden of a father's care in the education, maintenance and support of the minor children, without showing his fortune, earnings or capacity to earn, or his habits or treatment of his family. [Tetherow v. Railway Co., 98 Mo. 74, 84, 11 S. W. 310; Haines v. Pearson, 107 Mo. App. 481, 485, 81 S. W. 645; Sipple v. Gas Light Co., 125 Mo. App. 81, 95, 102 S. W. 608; Brunke v. Telephone Co., 112 Mo. App. 623, 628, 87 S. W. 84.] Nor was it necessary to show with any degree of exactness, his age or state of health.

[Orscheln v. Scott, 90 Mo. App. 352, 361; Bigelow v. Metropolitan St. Ry. Co., 48 Mo. App. 367, 375.] True, the losses mentioned were prospective in character and their extent depends somewhat upon the life expectancy of the deceased, but from the very nature of these cases, the damage is largely, if not altogether, conjectural, not subject even to approximate admeasurement, and juries are not confined to any exact mathematical calculation, but are vested with considerable discretion, with which the court will not interfere, unless it has been abused. [Parsons v. Railway, 94 Mo. 286; Brunke v. Telephone Co., supra; Stohr v. Railway, supra.] Even if the exact age of the deceased were shown, still the estimate must partake of the nature of conjecture. [Orscheln v. Scott, supra.] It must then be true that if any reasonable basis for the verdict can be inferred from the evidence, it is sufficient. Here it is shown that the deceased was employed as agent for an insurance company; that he had a child ten years old and another minor child whose age is not stated; that on the night of the injury he rode down town on a street car and was walking around at 2:30 o'clock in the morning and had been in a distant part of the city during the day. While it is true that the age and state of health of the deceased could not be inferred with any degree of accuracy from these facts, still it might fairly be inferred from them that the man was not extremely old or seriously disabled and had some degree of life expectancy. There was, then, something on which to base the verdict, and we do not feel that \$3500 allowed to a wife for the loss of the personal attention, helpfulness and usefulness of her husband, and the casting upon her of the support and care of two minor children, one of whom was only ten years of age, is so large as to shock our sense of justice, even though the life expectancy of the deceased might not appear to be very great. The trial court correctly refused said instruction and the verdict was not excessive.

5. Defendant next contends that plaintiff's instruction number 3 is erroneous because it went beyond the duties imposed by the ordinance in relation to the display and maintenance of lights. As the defendant has failed to bring the ordinance before us in the abstract, we will not pass upon this contention, but will accept the trial court's construction of the ordinance as correct for the purposes of this review. [Hausmann v. Hope, 20 Mo. App. 193, 196.]

6. Likewise we do not find any error of which defendant can complain, in the fact that seven other persons and corporations were made parties to this action and that at the close of plaintiff's evidence the cause was dismissed as to them. [Moudy v. St. Louis Dressed Beef Co., — Mo. App. —, 130 S. W. 476, 481.]

7. Defendant assigns as error the refusal of the court to instruct the jury that "if you find from the evidence introduced by plaintiff that the deceased F. H. G. Voelker, at the time he so fell into said cellar, was intoxicated, and that his intoxication actually contributed to his injury and death, then you are instructed that plaintiff is not entitled to recover, and your verdict should be for the defendant." It is sufficient to say of this assignment that the salient features of the above quotation are embodied in the instruction which the court gave of its own motion and which we next consider. [Beatty v. Clarkson, 110 Mo. App. 1, 6, 83 S. W. 1033.]

8. Lastly defendant assigns as error that the court gave the following instruction of its own motion:

"The court further instructs the jury that if you find and believe from all the evidence that the defendant, F. H. G. Voelker, directly contributed to his injury and death by his own negligence or want of ordinary care at the time and place of falling into the excavation in question, then plaintiff cannot recover in this case, and your verdict should be for the defendant; and in this connection you are further instructed that the

law does not permit anyone to voluntarily incapacitate himself from the ability to exercise ordinary care for his own safety, and then to recover for an injury to which his own want of care, so caused, had directly contributed, nor can the widow of a man, injured while so incapacitated and through a want of care so caused, recover for his death brought about by such injury. If the jury do find from the evidence in this cause that said deceased fell into the excavation in question while in a state of intoxication, and that such intoxication directly contributed to the happening of such injury, *and that such injury would not have occurred but for such intoxication*, then your verdict will be for the defendant." (Italics ours.)

Defendant insists that this instruction was erroneous in the italicized part thereof. We must also rule this assignment against the defendant. The instruction properly declares the law. [Hicks v. Mo. Pac. Ry. Co., 46 Mo. App. 304, 312; Pinnell v. St. L. A. & T. Ry. Co., 49 Mo. App. 170, 172; Zumault v. Railroads, 175 Mo. 288, 311, 74 S. W. 1015; Huss v. Bakery Co., 210 Mo. 44, 52, 108 S. W. 63.] In the last cited case an instruction was approved which, in the aspect mentioned, was substantially like the one under discussion.

We have considered all questions raised by this record, and it follows from what we have said, that the cause was fairly tried and submitted to the jury, and the judgment entered upon the verdict should be and is affirmed. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

FREDERICK C. BRANDT, Respondent, v. UNITED RAILWAYS COMPANY OF ST. LOUIS, Appellant.

St. Louis Court of Appeals, November 10, 1910.

1. **NEGLIGENCE: Existence of, Depends Upon Circumstances.** Negligence is a relative matter and must be determined from the circumstances of the particular case presented.
2. **STREET RAILROADS: Negligence: Speed Ordinance.** A limitation by ordinance of a rate of speed at which cars may be operated is not necessarily authority to run the cars in all circumstances to the limit of the speed prescribed.
3. ———: ———: **Excessive Speed.** Where the particular circumstances of the case present a situation suggesting danger as a usual thing, the operatives of street cars must conduct themselves with respect to the same as an ordinarily prudent person managing a dangerous agency would conduct himself in the same situation.
4. ———: ———: ———: **Speed of Twelve Miles per Hour.** Unless particular circumstances suggest some danger as a usual matter, the running of a street car at a rate of speed of twelve miles per hour is lawful, unless restrained by ordinance.
5. ———: **Collision at Crossing: Excessive Speed: Jury Question.** In an action for injuries sustained in a collision at a street crossing in a city, where people constantly move to and fro, between a vehicle driven by plaintiff and a street car operated by defendant, the circumstances in proof indicating a common use of the crossing, suggesting a possibility of injury more or less present as a usual thing, the question whether it was negligence to operate the car at a speed of twelve miles per hour was a question for the jury, although the maximum speed fixed by ordinance was fifteen miles per hour.
6. ———: ———: ———: **Right to Assume Speed was Not Excessive.** A person in driving across street car tracks at a public crossing is justified in assuming that street cars will be operated at such place at a rate of speed within that which is usual on a clear track.
7. **DAMAGES: Pleading: Loss of Earnings.** In an action for personal injuries, the petition averred that "said injuries did prevent, and will continue to prevent, plaintiff from fully exercising and conducting his business as heretofore." The testimony showed that plaintiff owned a coal and ice business, to which he gave his personal attention, and that by reason

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of his injuries he was unable to perform the work required by said business, necessitating the sale thereof. *Held*, the averments of the petition were sufficient to authorize a recovery for loss of earnings, since, under the facts stated, plaintiff's earnings were the result of his labors rather than of invested capital.

8. **PLEADING: Sufficiency of Petition: Not Attacked by Demurrer.** The averments of a petition, when not challenged by demurrer, must be interpreted by affording all reasonable inferences and intendments in their favor.
9. **APPELLATE PRACTICE: Non-Prejudicial Error.** Appellate courts are commanded by the statute not to reverse judgments except for error materially affecting the merits as to the party complaining on appeal.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm*, Judge.

AFFIRMED.

Geo. T. Priest, R. E. Blodgett and T. E. Francis for appellant; *Boyle & Priest* of counsel.

(1) The court erred in giving plaintiff's instructions Nos. 1 and 2 for the reason there was no showing to warrant a finding that the operation of the car at twelve miles per hour was an act of negligence, the ordinance introduced in evidence permitting cars to be operated at a speed not in excess of fifteen miles per hour. The law presumes the operation of a car within the ordinance rate, under ordinary circumstances, is not negligent operation. There was no showing in this case that conditions were extraordinary or unusual at the *locus in quo*, and the presumption is, they were not; and hence it follows as a conclusion of law that the operation of the car at a speed three miles per hour less than the maximum rate permitted by law was not negligent operation. *Higgins v. Railroad*, 197 Mo. 300; *Theobald v. Transit Co.*, 191 Mo. 432; *Petty v. Railroad*, 179 Mo. 674. (2) Instruction No. 3, defining the measure of damages, given at plaintiff's request, is erroneous, for the reason it authorized the jury to award

plaintiff damages for the loss of the earnings of his labor, in the absence of any averment in the petition counting on this element of special damages, and in the absence of any evidence tending to show what plaintiff's earning capacity was prior to his alleged injury or what loss of earnings he sustained. *Duke v. Railroad*, 99 Mo. 347; *Slaughter v. Railroad*, 116 Mo. 269; *Davidson v. Transit Co.*, 211 Mo. 320; *Keen v. Railroad*, 129 Mo. App. 301. (3) The verdict is excessive because presumptively it erroneously includes an award of damages for loss of earnings. *Nelson v. Railroad*, 113 Mo. App. 663; *Morris v. Railroad*, 144 Mo. 508.

Collins & Chappell, George W. Funke and E. V. Selleck for respondent.

(1) While the effect of the ordinance read by defendant was to make a speed of more than fifteen miles per hour negligence per se, it by no means follows that a less rate of speed was not negligent. Had the motorman on defendant's car vigilantly looked ahead, he would have seen that plaintiff's wagon was proceeding south on Florissant avenue, and known that it had an equal right to the street with defendant's car, and his duty to so proceed as to have kept his car within a rate of speed that would have enabled him to stop his car at any time that plaintiff should have turned into defendant's tracks. (2) The instruction on the measure of damages was not erroneous. Plaintiff established that he was in the coal and ice business, drove his own wagon delivering ice and coal, was making a good living for himself and his family, and that after and by reason of the accident he was unable to carry on said business and sold his business and has been unable to do anything since. *Mabray v. Gravel Company*, 92 Mo. App. 596.

NORTONI, J.—This is a suit for damages accrued to plaintiff through the alleged negligence of defend-

ant. Plaintiff recovered, and defendant prosecutes the appeal.

Plaintiff is the proprietor of an ice and coal business which he conducts in a small way, in person, by delivering those commodities from house to house. At the time of his injury, he was engaged in delivering ice in a one-horse wagon about 1 o'clock in the afternoon. Defendant's street car collided with plaintiff's wagon while he was in the act of crossing its south-bound track on Florissant avenue and inflicted serious and permanent injuries upon him. It appears Florissant avenue runs north and south along and adjacent to the west side of O'Fallon Park. Defendant maintains a double street car track in this street; the south-bound track being the one farthest west, and the north-bound track that farthest east. Plaintiff, with his horse and wagon, came from the west on Redbud avenue and into Florissant avenue at the intersection of those streets. After coming upon Florissant avenue, he drove south along the west side of that street for about 330 feet with the purpose to go eastward from Florissant on Harris avenue, and this, of course, involved crossing the car tracks. The evidence tends to prove that, just prior to turning southeast across defendant's car tracks to the intersection of Harris avenue, plaintiff looked to the northward and observed defendant's car standing on Florissant at the intersection of Redbud avenue as though it was either receiving or discharging passengers at that point. As the car then stood 330 feet north of Harris avenue, plaintiff guided his horse to the southeast across the car track intending to pass to the eastward on Harris avenue. He says just as his horse was in the act of passing upon the south-bound track he looked a second time and observed the car approaching him about seventy-five feet distant at a very high rate of speed. Plaintiff whipped his horse

and endeavored to escape, but the approaching car collided with the rear wheel of his wagon and occasioned the several injuries complained of. The petition contains three allegations of negligence. The first is to the effect that defendant's motorman in charge of the car ran the same at a great and unlawful rate of speed; the second allegation is to the effect that the motorman in charge of the car did not observe due care in looking out for vehicles upon Florissant avenue; and the third allegation is that the motorman neglected to make use of the appliances at his command in time to prevent plaintiff's injury when, by exercising ordinary care to that end, he might have avoided the collision. The third and last specification of negligence the court withdrew from the jury by instruction, as, in its opinion, the evidence failed to support it.

The court submitted the case to the jury, however, on the first two specifications of negligence. The jury were instructed for plaintiff, substantially, that if they found the street car was operated at a great and dangerous rate of speed under all of the circumstances of the case, or that the motorman operated the car without exercising ordinary care to discover vehicles on the track and in danger, then the finding should be for plaintiff if it appeared plaintiff's injury occurred directly as a result of defendant's failure in either respect. Plaintiff's first instruction referred to is as follows: "The court instructs the jury that if they believe and find from the evidence in this case that on the 3d day of October, 1908, the defendant was engaged in operating a line of street railway and cars along and over Florissant avenue in the city of St. Louis, and that said Florissant avenue was at said time an open public street of the city of St. Louis, and that on said date the plaintiff drove an ice wagon on said Florissant avenue near its intersection with Harris avenue in said city, and that, while plaintiff was driving on said Florissant avenue and attempting to cross the same at said

time and place, one of defendant's cars on said Florissant avenue in charge of defendant's motorman then and there ran against plaintiff's said wagon, upsetting the same, thereby inflicting any of the injuries detailed in the evidence, and, if the jury further believe and find from the evidence that the motorman operating said car striking plaintiff's wagon at said time and place ran said car at a rate of speed great and dangerous under all the circumstances of the case as detailed in the evidence, or that said motorman at said time and place ran said car without exercising ordinary care to discover vehicles upon said street in danger from said car, and that said collision with plaintiff's wagon directly resulted from said motorman's failure to use ordinary care in any or all of the particulars above stated, and that plaintiff himself at said time and place was exercising reasonable and ordinary care for his own safety, then your verdict must be for the plaintiff."

In so far as this instruction submitted to the jury the question of the motorman operating the car at a great and dangerous rate of speed under the circumstances of the case as a predicate of liability, it is criticised, for it is said there is not a word in proof tending to show the rate of speed shown in and of itself was a breach of duty on the part of defendant. A witness for plaintiff who was present at the time and qualified as an ex-motorman said the car was being operated just prior to the injury at twelve miles per hour. In respect of this matter, the negligence relied upon for a recovery is a breach of defendant's common-law duty, for in no manner does the case proceed as for a violation of the speed ordinance. Indeed, it was expressly stated on the trial for plaintiff that he relied upon negligence at common law as to this matter, for his proof was insufficient to disclose a breach of the ordinance. The city ordinance in evidence touching the speed of cars at the point in question inhibits their operation at a rate of speed beyond fifteen miles an hour, only.

It is suggested for defendant that, as the law presumes negligence when a car is shown to have been operated at a speed in excess of that prescribed in an ordinance, so it should be presumed there is no negligence on the part of defendant when it conclusively appears the car was operated at a rate of speed considerably within the ordinance limit. It is unnecessary to seriously consider the suggestion as to presumptions, for negligence is a relative matter and must be determined in the circumstances of the particular case presented for review. It is sufficient to say that a limitation by ordinance of a rate of speed at which cars may be operated is not necessarily authority to run the cars in all circumstances to the limit of speed prescribed. [Quincy Horse Ry., etc., Co. v. Gnuse, 38 Ill. App. 212; Nellis, Street Railroad Accident Law, 178.] Indeed, it may be even aside from the ordinance, the operation of a car at a much less rate of speed than that referred to will operate a negligent breach of duty on the part of defendant, if the facts and circumstances in proof disclose a situation fraught with great possibilities of danger to the public. [Van Natta v. People's Street Ry., etc., Co., 133 Mo. 13, 34 S. W. 505.] There can be no doubt that where the particular circumstances of the case present a situation suggesting danger as a usual thing, those operating the street car must conduct themselves with respect to the same as would an ordinarily prudent person managing a dangerous agency in the same situation. For instance, if it appears a multitude is accustomed to assemble on or about a car track in a great city, then the obligation of ordinary care for the safety of those thus usually assembled suggests that the car should be run at a very moderate rate of speed and under complete control while passing such point. So it is in the present case, though the evidence conclusively shows the car was not operated to exceed twelve miles an hour, an element of liability may appear against defendant notwithstanding the ordinance, if other facts

and circumstances in proof suggest such a rate of speed to have been careless. But it is said the case is utterly devoid of proof in respect of this matter. It may be conceded the authorities all go to the effect that, unless the particular circumstances in proof suggest some danger as a usual matter, the rate of speed here shown is lawful unless restrained by ordinance. The following cases are in point: *Higgins v. St. Louis & S. R. Co.*, 197 Mo. 300, 315, 316, 95 S. W. 863; *Petty v. St. Louis & M. R. R. Co.*, 179 Mo. 666, 78 S. W. 1003; *Theobald v. St. Louis Transit Co.*, 191 Mo. 395, 432, 90 S. W. 354; *Nellis, Street Railroad Accident Law*, 173.

There can be no doubt, had the instruction submitted the matter of unlawful speed conjunctively with that pertaining to the omission of the motorman to exercise ordinary care for plaintiff's safety, it would have been entirely proper; but, having submitted the matter of speed as a single predicate of liability, it may not be sustained unless there is something in the circumstances of the case from which the jury may reasonably infer that a rate of speed at twelve miles per hour was a breach of the obligation to exercise ordinary care as a usual thing at the point in question. When the facts are scrutinized, we believe there is sufficient in the case to render the question one for the jury. The fact that the motorman might, by exercising ordinary care, have seen plaintiff driving down the street and headed toward Harris avenue, should be put aside for the reason this clause of the instruction does not incorporate it as a matter to be considered with respect to defendant's liability. After setting this out of view entirely, the feature of the instruction under discussion is to be viewed solely in the light of the facts and circumstances which attended the situation as a usual thing and of which both plaintiff and those operating the street car are deemed to have had knowledge. It seems but fair to view all of that portion of Florissant avenue between Redbud avenue and Harris avenue as akin to a public

crossing, for it is to be remembered that O'Fallon Park lies on the east side of Florissant avenue, and those desiring to go east from Redbud avenue must travel south 330 feet in Florissant to the intersection of Harris avenue, which proceeds eastward on the south line of the park. In other words, Redbud avenue intercepts Florissant avenue immediately adjacent to the park, and all persons traveling east on Redbud avenue are required to turn and drive 330 feet to the southward and across the tracks in Florissant avenue to the end of reaching a street, Harris avenue, on which they may proceed on their journey to the eastward. Besides, these streets are public thoroughfares of a great city where people constantly move to and fro. In this situation, it appears those operating the street cars in Florissant avenue at this point should anticipate persons were usually using the portion of Florissant avenue involved as a crossing and operate the cars accordingly. In other words, we believe it was competent, solely in view of the circumstances suggested, which sufficiently appear to obtain as a usual condition, to submit the matter to the jury as a predicate of liability if it found that a speed of twelve miles per hour was dangerous and negligent at the place in question. The plaintiff was justified in assuming the defendant would operate its cars on this portion of the street at a rate of speed within that which is usual to a clear track, for it should anticipate persons crossing there. If there be circumstances in proof indicating a common use of the portion of the street mentioned, which suggest a possibility of injury more or less present as a usual thing, the question as to whether the rate of speed at twelve miles per hour is negligent is one for the jury, aside from the ordinance. [Nellis, Street Railroad Accident Law, 278, 279.]

Among other things, the instruction on the measure of damages submitted plaintiff's loss of earnings as a proper element for consideration. It is argued this

was error for the reason there was no averment in the petition to the effect that plaintiff's earnings were impaired by his injury, and further that there was no evidence as to what plaintiff's earnings were prior to the injury. The latter suggestion is an error as to the fact, for the evidence discloses plaintiff's earnings were thirty dollars per week prior to and at the time of his injury. The allegation of the petition is somewhat indefinite as to this matter, but we believe it to be sufficient. It is averred in the petition "said injuries did prevent, and will continue to prevent, plaintiff from fully exercising and conducting his business as heretofore." If it appeared plaintiff was working for a salary, this rather indefinite allegation might be regarded as insufficient, as it would not follow necessarily that his salary ceased or was diminished because he was prevented from fully exercising or conducting his business as theretofore. Such was the case of *Keen v. St. Louis, etc., R. Co.*, 129 Mo. App. 301, 305, 108 S. W. 1125. It appears here that plaintiff owned a coal and ice business to which he gave his personal attention by delivering ice and coal to his customers. The testimony is that, besides being confined to the hospital for several weeks because of his broken arm and other injuries, he was rendered wholly unable to perform the duties of cutting ice and shoveling coal. Because of this he finally sold his business to another. But it is urged the chief purpose of pleading is to convey notice to the adverse party of the particulars as to which the damage is sought. In view of this, it is said defendant is not sufficiently advised by the allegation that the injuries prevented, and will continue to prevent, plaintiff from conducting his business as theretofore that he sought to recover personal earnings. The argument might be valid in some cases, but is without force here, for the present petition on its face sets forth facts sufficient to advise defendant about the whole matter and, furthermore, the proof is complete. It is averred in the peti-

tion, identically as the proofs show, that plaintiff owned and conducted a small ice and coal business, which occupied him personally in making deliveries from house to house and place to place. The petition reveals, too, that plaintiff was in the very act of driving his horse and wagon in making deliveries of ice at the time of his injury. The averments of a petition, when not challenged by demurrer, as in this case, must be interpreted by affording all reasonable inferences and intendments in their favor. When so considered, in connection with all of the facts set forth, the averment that plaintiff's injuries prevented, and will continue to prevent, him from fully exercising and conducting his business as theretofore, is sufficient to authorize a recovery for loss of earnings; for his earnings in such case are the result of his labors rather than of invested capital. Indeed, if one accustomed to prosecuting such a business by his own efforts, which yields him thirty dollars per week, is disabled from further performing his duties in respect of such business, the reasonable inference is that the loss entailed is that of his personal earnings rather than that of invested capital. At any rate, it sufficiently appears on the whole case that the capital of plaintiff's business was his personal effort in conducting it and its yield was from that source.

We are commanded by the statute not to reverse judgments except for error materially affecting the merits as to the party complaining on appeal. In view of this and what has been said, we believe the court did not err in permitting a recovery for a loss of earnings in the circumstances of the case. For an authority in point, see *Thomas v. Union Ry. Co.*, 18 App. Div. (N. Y.) 185. See, also, 8 Am. and Eng. Ency. Law (2 Ed.), 654; *Mabrey v. Cape Girardeau & Gravel Road Co.*, 92 Mo. App. 596. The other questions do not merit discussion. The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

STATE OF MISSOURI, Respondent, v. CHARLES
BRAND, Appellant.

St. Louis Court of Appeals, November 10, 1910.

PHYSICIANS AND SURGEONS: Practicing Without License: Crimes and Punishments: Information: Failure to Negative Exception in Statute. An information, under section 8315, Revised Statutes 1909, charging defendant with representing himself to be a duly authorized practicing physician and surgeon when he had no license from the state board of health and was not a registered physician, which fails to negative the proviso in said section, to the effect that physicians, who were registered on or prior to March 12, 1901, shall be regarded as licentiates and registered physicians, is insufficient; the proviso being part and parcel of the enacting clause of the statute, and it being necessary, therefore, to negative it in the information.

Appeal from St. Louis Court of Criminal Correction.—
Hon. Wilson A. Taylor, Judge.

REVERSED.

William E. Fish for appellant.

Philips W. Moss for respondent.

NORTONI, J.—Defendant was convicted on the charge of having represented himself as a duly authorized practicing physician and surgeon, and prosecutes an appeal from the judgment.

The information on which the conviction was had, after formal parts, recites that the prosecuting attorney within and for the city of St. Louis, on behalf of the State of Missouri, informs the court, etc. Then follows the precise charge laid against defendant, to wit:

"That Charles Brand, in the city of St. Louis, on the 12th day of March, 1908, being not then and there a regularly licensed physician or surgeon and holding no license from the State Board of Health, and not being a registered physician, as required by law, did on the 12th day of March, 1908, by signs and circulars and by other means, represent himself to be a duly authorized practicing physician and surgeon, and authorized by law to treat the sick and afflicted, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the state."

The prosecution proceeds under section 8315, Revised Statutes 1909, the same being the Act of 1901, Laws 1901, page 207, as amended in 1907, see Laws 1907, page 358. It will be observed by a careful reading of section 8315, above referred to, that it concludes with a proviso to the effect that physicians who were registered on or prior to March 12, 1901, shall be regarded for all purposes of the act as licentiates and registered physicians under its provisions. The identical question present for decision in this case was before the court only a few months ago in the case of *State v. Hellscher*, 150 Mo. App. 230, 129 S. W. 1035. In the case mentioned, the court gave judgment to the effect that the proviso above referred to exempted physicians who were registered prior to March 12, 1901 from the operation of the penal provisions contained in the act, which is now section 8315. It was ruled, too, that this exemption from the operation of the act was part and parcel of the enacting clause of the statute and therefore should be negatived in the information. The information in the case mentioned was declared insufficient for the reason that it failed to allege defendant was not registered as a physician or surgeon on or prior to March 12, 1901. The information now before us is in all respects substantially the same as that in judgment before. In respect of the matter for which the information in *State v. Hellscher* was declared insuffi-

cient, the present information is identical. Under the rule of the case mentioned, the court should declare the present information fatally defective for its failure to allege that defendant was not a registered physician on or prior to March 12, 1901. The judgment should be reversed and defendant discharged. It is so ordered. *Reynolds, P. J., and Caulfield, J., concur.*

JOHN STOLZE, Appellant, v. UNITED STATES FIDELITY AND GUARANTY COMPANY, Respondent.

St. Louis Court of Appeals, November 10, 1910.

1. **PRINCIPAL AND SURETY: Payment of Obligation Secured: Discharge of Surety.** The surety's obligation is secondary to that of the principal obligor, and when it appears the principal has paid the debt secured, the obligation of the surety is fully discharged.
2. ———: **Discharge of Principal After Judgment: Discharge of Surety.** The relation of principal and surety is not destroyed by a judgment against them, but so long as the relation continues, the equities which inhere therein obtain and are available for the surety's relief; so that where a judgment was rendered against the principal and surety on an appeal bond, and the principal alone appealed, and the judgment as against the principal was reversed, such reversal operated to discharge the surety, and the judgment rendered against the surety, which was unappealed from, could not be enforced.
3. ———: ———: ———: **Statute.** The fact that section 2769, Revised Statutes 1909 makes the obligation of the parties both joint and several and that a judgment thereon is regarded as such a contract is without influence in a case where a judgment on an appeal bond against both principal and surety, which is reversed as to the principal on his appeal, is sought to be enforced against the surety, who did not appeal, inasmuch as the statute does not contemplate nor intend to annihilate the equities which obtain between joint obligors and which attend the relation of principal and surety.

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow*, Judge.

AFFIRMED.

A. R. Taylor for appellant.

(1) The effect of the reversal and remand of the cause as to the St. Louis Transit Company left the judgment standing as to the non-appealing party, the respondent in this appeal. The liability on the judgment was joint and several, because the statute, section 889, Revised Statutes 1899, so provides. *McElroy v. Ford*, 81 Mo. App. 507 (overruling *Sheehan & Holn Co. v. Sims*, 28 Mo. App. 65); *State ex rel. v. Tate*, 109 Mo. 270; *Keenan v. St. Joseph*, 126 Mo. 96. (2) There can be no question that the appeal bond on which judgment of April 10, 1906, was rendered, was a joint and several bond. *Manny v. Security Co.*, 103 Mo. App. 716.

Boyle & Priest and *T. E. Francis* for respondent.

The liability of the United States Fidelity and Guarantee Company is secondary, not primary; derivative, not original. Its liability is dependent upon the liability of the principal in the bond; if the latter did not breach the bond, the former is not liable. The Court of Appeals has, by its opinion and judgment in this case, determined that the principal did not breach the bond; therefore, the surety is not liable and the judgment against it is void. *Brandt on Suretyship* (3 Ed.), sec. 167; *Ames v. Maclay*, 14 Iowa 281; *Beall v. Cochran*, 18 Ga. 38; *Miller v. Gackins*, 1 Smedes and Mar. Ch. Rep. (Miss.) 524; *Trotter v. Strong*, 63 Ill. 272; *Dickson v. Bell*, 13 La. Ann. 249; *Michener v. Springfield Thresher Co.*, 142 Ind. 130; *Baker v. Merriam*, 97 Ind. 539; *State v. Blake*, 2 Ohio St. 147; *Rice v. Morton*, 19 Mo. 264; *Smith v. Rice*, 27 Mo. 505;

Priest v. Watson, 72 Mo. l. c. 315; Hempstead v. Hempstead, 27 Mo. 187.

NORTONI, J.—This is an attempt to enforce the liability of a surety for an undertaking, after the indebtedness vouchsafed had been extinguished by the principal obligor. The court denied the right asserted and plaintiff complains of the ruling.

The facts out of which the question arises are as follows: It appears plaintiff recovered a judgment for \$15,000 against the St. Louis Transit Company and an appeal was perfected therefrom by defendant in that case to the Supreme Court. The present defendant, the United States Fidelity & Guaranty Company, became surety on the appeal bond of the St. Louis Transit Company in the amount of \$30,000. The condition of the appeal bond and on which the present defendant undertook to respond for the default of its principal, St. Louis Transit Company, was as follows:

“Now, if said appellant shall prosecute this appeal, with due diligence, to a decision in the appellate court, and shall perform such judgment as shall be given by such court; or such as the appellate court, may direct the circuit court, city of St. Louis, to give, and if the judgment of said circuit court, or any part thereof be affirmed, and said appellant shall comply with and perform the same, so far as it may be affirmed, and pay all damages and costs which may be awarded against it by any appellate court, then this obligation to be void, otherwise to remain in full force and effect.”

In due time the Supreme Court disposed of the appeal by affirming the judgment appealed from to the extent of \$8000, that is to say, plaintiff was required to remit \$7000 of his recovery and a new judgment was rendered in the Supreme Court in his favor in the amount of \$8000. The St. Louis Transit Company, defendant in that suit, paid plaintiff the amount of the judgment given by the Supreme Court, that is, \$8000,

and such interest thereon as accrued after its rendition in the Supreme Court, but declined to pay interest on the amount from the date of the original judgment in the circuit court from which the appeal was prosecuted. The St. Louis Transit Company, in thus paying the amount of the judgment, \$8000, and interest from the date of its rendition in the Supreme Court, proceeded on the theory that as the judgment of the circuit court was not affirmed for the full amount an entirely new judgment was given by the Supreme Court which operated the accrual of interest from its date only. Plaintiff denied the theory suggested and to the end of recovering interest from the date of the original judgment in the circuit court, instituted his suit against both the St. Louis Transit Company and the present defendant on its appeal bond for the sum of \$1254, which appears to be six per cent on the amount of \$8000 from the date of the rendition of the original judgment in the circuit court to the date of its affirmance on appeal. On a trial, the circuit court accepted the theory of plaintiff and gave judgment against both the St. Louis Transit Company, principal in the appeal bond, and the present defendant, its surety thereon, for the amount prayed. From this judgment against both the principal and surety in the appeal bond, the St. Louis Transit Company alone prosecuted its appeal to this court. In due time, the court decided that the judgment of the Supreme Court affirming that of the circuit court for \$8000 after remittitur entered was an entirely new judgment, on which interest accrued only from the date of rendition, and that the St. Louis Transit Company by paying to plaintiff the sum of \$8000, together with interest thereon from the date of the judgment of the Supreme Court to the time it was paid had discharged the full measure of its obligation. [See *Stolze v. St. Louis Transit Co.*, 122 Mo. App. 458, 99 S. W. 471.] As the present defendant, surety on the appeal bond, omitted to appeal from the judgment of the cir-

cuit court given against it jointly with the St. Louis Transit Company, and the term at which the judgment was given had expired, plaintiff proceeded to the end of enforcing the judgment against the present defendant, for the purpose of collecting the interest which this court had determined the principal in the appeal bond was not obligated to pay. The trial court denied plaintiff's right, on the theory that the extinguishment of the obligation by the principal operated, of course, to discharge the surety, for the reason the undertaking of the surety is secondary only. The proposition is entirely clear, for when it appears the principal has paid the debt secured, then the obligation of the surety is fully discharged. Beyond question the surety's obligation is secondary only to that of the principal obligor. The matter is so plain that no one will dispute it. This being true, the terms of the surety's undertaking are fully met and complied with if the principal in the bond discharges the debt, for thereafter, there is naught to enforce against the surety on his secondary undertaking. Because of the equities which inhere in the relation of principal and surety, there is an implied undertaking between them to the effect the principal shall compensate the surety to the extent of his outlay because of the breach of the obligation on the part of the principal. It is therefore the rule that if the surety pays the debt he may sue his principal and enforce a reimbursement. If then the surety is required to pay the debt after it has been extinguished or paid by the principal, an unjust condition will arise, for by enforcing his right to a reimbursement, the principal is compelled to pay the same debt the second time or denied the benefit of that which operated its discharge or extinguishment.

But it is said, though, under the rule which obtains, a surety is discharged by the principal's payment or ex-

tinguishment of the obligation before judgment thereon, it is without influence here. Such is not the law. The relation of principal and surety is not destroyed by the judgment, and as long as the relation continues the equities which inhere therein obtain and are available for the surety's relief. The just principle which operates to relieve the surety from his secondary obligation when it appears the principal has discharged or extinguished the debt obtains identically after judgment as before. [Hempstead v. Hempstead's Admr., 27 Mo. 187; Trotter v. Strong, 63 Ill. 272; 1 Brandt on Suretyship (3 Ed.), sec. 167.] That a surety against whom judgment has been recovered and unappealed from in a suit on the contract of suretyship is discharged by a subsequent judgment in favor of the principal alone on the same obligation is the accepted rule of decision, may be ascertained by reference to the following authorities in point: Ames v. Maclay, 14 Iowa 281; Beall v. Cochran, 18 Ga. 38; Dickason v. Bell, 13 La. 249; 1 Brandt on Suretyship (3 Ed.), sec. 167.

The case presented discloses a valid judgment in favor of the principal to the effect that it had fully paid and discharged the obligation assured in the appeal bond. Therefore, to enforce the judgment, which was not appealed from by the present defendant, against the surety would clearly operate to confer the right upon this defendant of reimbursement from its principal, the St. Louis Transit Company. A recovery by this defendant on the implied obligation against its principal would operate to wholly destroy the benefit of the judgment given in behalf of the principal to the effect it had paid all it was obligated to pay and did not owe the debt sued for. The principles of natural justice alone forbid the result suggested. [Trotter v. Strong, 63 Ill. 272, and authorities supra. See, also, Taylor v. Sartorius, 130 Mo. App. 23, 108 S. W. 1089.] The fact that our statute makes the obligation of the parties both joint and several and that a judgment

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thereon is regarded as such a contract is without influence in the case, for the statute does not contemplate nor intend the utter annihilation of the equities which obtain between joint obligors and which attend the relation of principal and surety. [See *Taylor v. Sartorius*, 130 Mo. App. 23, 108 S. W. 1089.]

It appearing that the principal obligor has been discharged of the debt by the judgment in its favor, the secondary liability of the surety may not be enforced even though it has been reduced to judgment. The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

WILLARD D. RICE, By next friend, Respondent, v.
CHICAGO, BURLINGTON & QUINCY RAIL-
WAY COMPANY, Appellant.

St. Louis Court of Appeals, November 10, 1910.

1. **CARRIERS OF PASSENGERS: Railroads: Injury to Passenger: Presumption of Negligence.** The mere fact of injury to a passenger while on his journey, without any evidence connecting the carrier with its cause, does not raise a presumption of negligence; but where the passenger establishes the relation of passenger and carrier and indicates that his injury during transit resulted from a breach of duty which the carrier owed pertaining to his safety, a presumption of negligence on the part of the carrier arises, and thereupon it devolves upon the carrier to explain such presumption away.
2. ———: **Care Required.** A carrier is not an insurer of the safety of its passengers, but it must exercise the highest degree of care of a very prudent person.
3. ———: ———: **Injury to Passenger: Presumption of Negligence: Res Ipsa Loquitur.** A passenger who shows that the train collided with the top of a tree which had blown across the track and that he was injured in consequence thereof, shows facts from which a presumption of negligence of the carrier arises, and it then devolves upon the latter to acquit itself by showing there had been no breach of duty on its part.

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4. **NEGLIGENCE: Res Ipsa Loquitur.** Where the thing which occasions the injury complained of is conclusively shown not to have been under the management or within the control of defendant, the doctrine of *res ipsa loquitur* does not obtain; but where the thing is shown to have been under the management of defendant, or his servants, and the accident is such as under the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care.
5. **CARRIERS OF PASSENGERS: Care Required: Assault of Passenger by Third Person.** A carrier is under no obligation to protect a passenger from the criminal assault of persons in the street in no way connected with the carrier and which assault there was no reason to anticipate.
6. **———: Railroads: Injury to Passenger: Obstruction on Track: Presumption of Negligence: Res Ipsa Loquitur.** The presumption of negligence of a carrier arising from proof of injury to a passenger in consequence of a train colliding with an obstruction on the track is not overcome in every case by the carrier showing conclusively that the obstruction was one not under its control, since there are instances where the carrier might have been otherwise negligent in the premises and such negligence operated proximately to occasion the obstruction, and besides the high duty obtains against a carrier to maintain a clear track.
7. **———: ———: ———: ———: ———: ———.** The presumption of negligence of a carrier arising from proof of injury to a passenger due to a collision of the train with an obstruction on the track continues to inhere with sufficient probative force to support a verdict until the carrier has overcome it by not only showing that it had no notice of the particular obstruction but by showing as well that it was in no respect remiss in its duty in preventing the obstruction from finding its way upon the track in the first instance, and also until the carrier shows it could not have avoided the collision by employing the appliances at hand, after it saw or might have seen the obstruction.
8. **———: ———: ———: ———: Duty of Carrier.** A carrier of passengers must look out for and remove such objects along and adjacent to its roadway as may threaten the safety of its passengers, and where threatening objects, such as decayed trees, stand immediately adjacent to the right of way and are sufficiently menacing to evince probable danger, it must exercise high care as to them, and must remove them when it can do so without becoming a trespasser.

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9. **RAILROADS: Removal of Trees Adjacent to Right of Way: Statute.** Section 3049, Revised Statutes 1909, conferring authority on railroad companies to go in and upon the lands of adjacent proprietors and remove threatening trees, making compensation therefor, is parcel of the charter of railroad companies and lays a duty upon them accordingly.
10. **CARRIERS OF PASSENGERS: Railroads: Injury to Passenger: Dangerous Tree Adjacent to Right of Way: Concurring Negligence.** In an action for injuries to a passenger in consequence of a train colliding with a tree which had fallen on the track, evidence that the tree had been standing for many years on premises adjacent to defendant's right of way in a decayed and threatening condition tended to prove a breach of duty on defendant's part in failing to remove such tree, and although a fire burning in the body of the tree contributed to its falling, still defendant's negligence in permitting it to remain standing was proximate, in that such negligence concurred with the act of another in starting the fire to cause the injury, and defendant's liability may be sustained on that score.
11. ———: ———: ———: **Obstruction on Track: Res Ipsa Loquitur: Pleading: Sufficiency of Petition.** In an action for injuries to a passenger in consequence of a train colliding with a tree on the track, the petition, which alleged generally that defendant permitted a large tree to be and remain upon its track and negligently ran its locomotive and train of cars into the same, to plaintiff's injury, was sufficient, since, under these facts, a presumption of defendant's negligence obtained, and the burden was cast upon defendant to exculpate itself from all manner of negligence which operated to induce the injury.
12. ———: ———: ———: ———: ———: ———: **Specific Acts Included Under General Allegation of Negligence.** In such a case, the cause of action relied upon under the general allegation of negligence includes any and all derelictions on the part of defendant which operated proximately to breach defendant's duty in respect of its obligation to exercise high care for plaintiff's safety, so that it was not error to instruct the jury that, although the collision occurred as a result of the tree adjacent to the right of way falling across the track immediately before the approach of the train, the finding should nevertheless be for plaintiff, if the jury found the tree was greatly decayed and in danger of falling upon the track and had so been for a long time and that there was a fire burning therein, of which facts defendant had knowledge or might have had by the exercise of due care on its part, and, because of such decayed condition, fire and weight of the tree, it fell upon the track, although the petition did not contain an express allegation as to the decayed and dangerous tree standing beside

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the right of way, nor as to the smoldering fire therein, nor that defendant had omitted its duty in respect of removing the tree before it fell.

13. **ACTION: Cause of Action.** The term "cause of action" signifies plaintiff's primary right and defendant's wrongful violation thereof.
14. **CARRIERS OF PASSENGERS: Railroads: Injury to Passenger: Obstruction on Track: Res Ipsa Loquitur: Pleading: Evidence.** In an action for injuries to a passenger in consequence of a train colliding with a tree on the track, where the carrier, after the passenger's prima facie case was made by invoking the presumption of negligence, sought to show that the tree recently fell on the track and that it came there without any negligence on its part, it was competent for the passenger in rebuttal to show the carrier's negligence in permitting the tree to stand beside the right of way, because the tree was a menace on account of its decayed and burned condition, though the petition merely alleged generally the negligence of the carrier in permitting the tree to remain on the track and in negligently running the train into it.

Appeal from Scotland Circuit Court.—*Hon. Charles D. Stewart, Judge.*

AFFIRMED.

M'Kee & Jayne, H. H. Trimble and Palmer Trimble for appellant.

(1) The demurrer to the evidence at the close of all the evidence should have been sustained. Negligence cannot be presumed from the fact of an accident and resulting injury. *Yarnall v. Railroad*, 113 Mo. 570; *Schafer v. Railroad*, 128 Mo. 64; *Railroad v. MacKinney*, 135 Pa. St. 462. (2) Where there is proof of a failure in any of the machinery or appliances used by defendant in transporting the complaining party, and that such failure caused the injury complained of, then negligence may be inferred, but where the injury is caused by an outside or extrinsic cause, a different rule applies. Plaintiff must show by a preponderance of evidence that defendant was negligent as

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respects this outside force. 4 Elliott on Railroads (2 Ed.), sec. 1644, notes 228, 229, 230, 231; sec. 1701, notes 152, 153, 173; *Woas v. St. Louis Transit Co.*, 198 Mo. 664; *Curtis v. Railroad*, 18 N. Y. 534; *Railroad v. MacKinney*, 124 Pa. St. 462. (3) Only ordinary care required to guard against extrinsic causes, forces or obstacles. *Woas v. St. Louis Transit Co.*, 198 Mo. 564; *Flemings v. Mendenhall, Receiver*, 88 Minn. 336; *Tall v. Steamer Packet Co.*, 90 Md. 248; *Railroad v. Pillsbury*, 123 Ill. 9. (4) The cause of the injury complained of in this case was the limb of a tree that had fallen across the track. It was not an obstacle placed thereby the railroad company. Proof of such a cause does not raise a presumption of negligence. *Schafer v. Railroad*, 128 Mo. 71; *Railroad v. MacKinney*, 135 Pa. St. 402; *Woas v. St. Louis Transit Co.*, 198 Mo. 676; *Saunders v. Railroad*, 60 N. W. 148; *Curtis v. Railroad*, 18 N. Y. 534; *Lincoln Traction Co. v. Webb*, 37 Am. and Eng. (N. S.) 369; *Harrison v. Railroad*, 23 Am. and Eng. (N. S.) 809; *McCune v. Railroad*, 55 Pac. Rep. 354; *Fleming v. Railroad*, 27 Atl. 858; *Trotter v. Railroad*, 122 Mo. App. 405; *Clark v. Railroad*, 127 Mo. 197; *Dougherty v. Railroad*, 9 Mo. App. 478. Citing *Scott v. Dock Co.*, p. 485. 6 Thompson, Law of Negligence, sec. 7635. (5) The trial court cannot enlarge the issues in the case by instructions. The issues can only be settled by pleadings, either original or amendatory. *Link v. Vaughan*, 17 Mo. App. 585; *Ernsverth v. Barton*, 60 Mo. 511; *Bank v. Armstrong*, 60 Mo. 70; *Glass v. Gelwinn*, 80 Mo. 297; *Waldhier v. Railroad*, 71 Mo. 514; *Feurth v. Anderson*, 87 Mo. 354; *Feary v. Railroad*, 162 Mo. 96; *Hemphill v. Kansas City*, 100 Mo. App. 566; *Thompson v. Bucholz*, 107 Mo. App. 123; *Bank v. Westlake*, 31 Mo. App. 565. (6) Appellant was not guilty of negligence in permitting the tree in question to remain on its track, unless it knew or by the exercise of due diligence could have known that it was upon the track and failed after knowing or after

being chargeable with knowledge to take proper measures to protect the train in question. 4 Elliott (2 Ed.), sec. 1644, note 228, 229, 230; Woas v. Railroad, 198 Mo. 664; Fleming v. Mendenhall, 88 Minn. 336; Frederick v. Railroad, 157 Pa. St. 103; Trotter v. Railroad, 122 Mo. App. 405; Railroad v. Kuhn, 6 S. W. 441, 86 Ky. 578; Connell v. Railroad, 93 Va. 44; Railroad v. Burke, 53 Miss. 200; Bretten v. Railroad, 18 N. Y. 534; Thomas v. Railroad, 23 Atl. 989; Stimpson v. Railroad, 75 Wis. 381.

T. L. & L. J. Montgomery and N. M. Pettingill for respondent.

(1) It was the duty of defendant to remove the tree standing within fifty feet of the south rail of its track, as there was danger of its falling on the road, whether said tree was on or off the right of way. Whether it was sound or rotten. R. S. 1899, sec. 1035, par. 3; Railroad v. Vallie, 60 Tex. 481. (2) Plaintiff made out of a case authorizing the court to submit the allegations of negligence by showing the collision of the train with the tree and the breaking of the car windows in which plaintiff was riding causing the injury to plaintiff. Ferguson v. Railroad, 123 Mo. App. 590; Clark v. Railroad, 127 Mo. 197; Sweeney v. Railroad, 150 Mo. 384; Furnish v. Railroad, 102 Mo. 438; Padgett v. Railroad, 159 Mo. 143; Thomas on Negligence (1 Ed.), p. 230; Railroad v. Vallie, 60 Texas 481; 5 Am. and Eng. Ency. Law (2 Ed.), p. 522; Johnson v. Railroad, 104 Mo. App. 588; Allen v. St. Louis Transit Co., 183 Mo. 311; 2 Greenleaf on Evidence (15 Ed.), 214 note; 2 Encyclopedia of Ev., p., 909, 915; Sullivan v. Railroad, 72 Am. Dec. 698; 6 Cyc. Law and Proc., p. 619, par. 5 and 6. (3) If the fire in the tree, even though not communicated by defendant's engine, concurred in causing the collision, defendant is liable. Newcomb v. Railroad, 169 Mo. 409; 1 Thompson on Negligence (1 Ed.),

sec. 75, vol. 3, sec. 2779; Bishop on Non-Contract Law, secs. 39 and 518; Brash v. St. Louis, 161 Mo. 437; Sherman and Redfield on Negligence (5 Ed.), sec. 122.

NORTONI, J.—This is a suit for damages accrued to plaintiff on account of personal injuries received through the alleged negligence of defendant, a carrier of passengers. Plaintiff recovered and defendant prosecutes the appeal.

The matter for consideration presents, first, the question as to whether or not the doctrine of *res ipsa loquitur* obtains on the facts of the case, and, second, as to whether the judgment for plaintiff may be sustained though it was given on a detail of negligence not pointedly alleged in the petition, although within the general scope of the cause of action alleged, which relates to defendant's breach of duty to exercise high care for plaintiff's safety.

Defendant is a public or common carrier of passengers. It appears plaintiff was a passenger on its train en route from Downing to Memphis, Missouri, and during the transit the train collided with the top or several limbs of a large tree which had fallen across the track. Upon colliding with the branches of the tree top, the locomotive and cars passed through the same, but, while passing, one limb scraped along the side of the car and shattered the glass in the window adjacent to which plaintiff was sitting, which resulted in destroying his eye. The petition contains a general allegation of negligence to the effect that defendant breached its duty to exercise high care for plaintiff's safety by allowing its track to be obstructed in permitting a large tree to be and remain on and across said track so that the train and car upon which plaintiff was riding ran into and collided therewith. At the trial, plaintiff introduced evidence tending to prove that he was a passenger on defendant's train en route from Downing to Memphis, about 7:30 o'clock in the even-

ing when the train ran into or collided with an obstruction on the track; and that such obstruction was the top branches of a large tree. It was shown that upon running into the tree top the engine passed through the same and a limb of about two or three inches in diameter scraped along the side of the passenger coach, in which plaintiff was being conveyed, with such force as to break and dissever the glass in the window adjacent, a portion of which glass flew into and destroyed his eye. The proof on the part of plaintiff in no manner suggested how the tree top came upon the track nor did it suggest how long it had been there nor from whence it came. Indeed, plaintiff rested his case *prima facie* on the presumption of negligence which usually attends the facts of showing a collision on a railroad with an obstruction on the track, when the relation of passenger and carrier exists. At the conclusion of this proof, defendant requested the court to direct a verdict for it on the theory that a presumption of negligence did not arise on the facts appearing and it devolved upon plaintiff to make a showing to the effect defendant had either placed the tree top on its road or had known, or, by the exercise of due care, might have known, its presence to the end of showing a breach of its obligation as to removing the same. The court declined to instruct a verdict for defendant and tried the case as though the presumption of negligence obtained.

It is argued here on the part of defendant that the doctrine of *res ipsa loquitur* as between carrier and passenger obtains only in those cases where it appears the injury resulted from some defect in the carriage or appliances for transportation or in the construction of the road, such as a defect in the track or a bridge or a collision with another train on the same track, for it is said these things in and of themselves suggest a dereliction of duty somewhere on the part of the carrier as to the means and appliances afforded by it for the transportation or as to its servants in operat-

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ing the same. There can be no doubt that the mere fact of injury suffered by a passenger while on his journey, without any evidence connecting the carrier with its cause, is not sufficient to raise the presumption of negligence on the part of the carrier. But if the proof as made suggests the injury to have resulted from a breach of care on the part of the carrier, then the presumption goes to that effect. [Shearman & Redfield on Negligence (5 Ed.), secs. 516, 559, 560.] There are instances of injuries to passengers where the proof of the injury itself discloses no lack of duty performed on the part of the carrier. In such circumstances, instead of the facts suggesting and invoking a presumption to the effect that the carrier is negligent, the presumption is actually repelled, and for that reason, does not obtain. [Woas v. St. Louis Transit Co., 198 Mo. 664, 96 S. W. 1017; Railroad v. Mitchell, 11 Heisk. (Tenn.) 400, 405; 5 Am. and Eng. Ency. Law (2 Ed.), 622, 623, 624; Benedick v. Potts, 88 Md. 52; 3 Hutchinson on Carriers (3 Ed.), sec. 1412.] So it is in every case the facts attending the accident must point a negligent breach of some duty, which the carrier owes to the passenger, before the presumption of negligence may arise. It is, therefore, entirely clear that when plaintiff, by his proof, establishes the relation of passenger and carrier and indicates that his injury, received during the transit, resulted from a breach of some duty which the carrier owed pertaining to his safety, the presumption of negligence arises against the carrier, and it thereupon devolves upon him to explain it away. [3 Hutchinson on Carriers (3 Ed.), secs. 1412, 1413, 1414; Dougherty v. Mo. Pac. R. Co., 9 Mo. App. 478; Trotter v. St. Louis & S. R. Co., 122 Mo. App. 405, 99 S. W. 508; Clark v. C. & A. R. Co., 127 Mo. 197, 29 S. W. 1013; Benedick v. Potts, 88 Md. 52; Curtis v. Rochester, etc., R. Co., 18 N. Y. 534; 2 Greenleaf on Evidence (Lewis Ed.), sec. 222; Shearman & Redfield (5 Ed.), secs. 516, 559, 560.]

It is true defendant, a public carrier, is not an insurer of the safety of its passengers. Nevertheless its obligation was to exercise for plaintiff's safety the highest degree of care of a very prudent person in view of all the facts and circumstances at the time of his injury. [Clark v. C. & A. R. Co., 127 Mo. 197, 29 S. W. 1013.] Among other things, this obligation enjoined upon defendant the duty of exercising high care to the end that its railroad and tracks should be sound and secure and free from obstructions whether temporary or permanent. This feature of the obligation is imposed for the purpose of preventing collisions with any manner of obstructions which may operate to entail injury on the passenger. [2 Hutchinson on Carriers (3 Ed.), secs. 925, 947; 6 Cyc. 620; Clark v. C. & A. R. Co., 127 Mo. 197, 29 S. W. 1013; 4 Elliott on Railroads (2 Ed.), secs. 1635, 1636.] It, therefore, appears that by showing the relation of carrier and passenger and the collision with the tree top on the track, plaintiff disclosed circumstances indicating that defendant had breached its obligation to exercise high care to the end of maintaining its track free of obstructions, for in the ordinary course of things, if due care is exercised, such obstructions are not allowed upon a railroad track. This being true, the presumption of negligence arose and it devolved upon defendant to acquit itself by showing there had been no breach of duty on its part.

To the end of acquitting itself of negligence, defendant introduced abundant proof showing the tree in question had fallen across its track only thirty minutes before the collision in which plaintiff was injured. This is accepted as an established fact in the case. From this proof, it appears the tree in question was a very large one and stood immediately adjacent to defendant's right of way. The proof is conclusive to the effect the tree stood immediately outside defendant's right of way fence but within fifty feet of the center of its track. The railroad right of way is one hundred feet

in width and all of the body of the tree was south of the right of way line except less than one inch thereof. To be precise, by exact measurements, it appeared the north side of the tree was forty-nine feet and eleven and thirty-eight one hundredths inches south of the center of the railroad track. The tree appears to have been a very large one, about four feet in diameter and was green, that is to say, it was not a dead tree. But it was decayed in the center to such an extent that it consisted of a mere shell between two and three inches in thickness. On its southeast side, there was an aperture in the shell of the tree about two and one-half feet high and thirteen inches wide. One witness said a man could pass through this hole. There was another small hole on its northwest side. One witness, at least, referred to it as a double tree, the major portion of which leaned to the southward, or away from the railroad, and the smaller portion to the north, toward the track. All of the other witnesses spoke of it as a forked tree, and it is described as being a large tree with the fork about eleven or twelve feet above the ground. The larger portion of the tree above this fork leaned to the southward, away from the railroad, the small portion above the fork, which was probably eighteen inches in diameter, leaned to the northward and toward the track, but it all rested upon the insecure foundation consisting of a hollow trunk. Besides these facts, defendant showed as well that some one had communicated fire to the tree in the hollow portion thereof at the butt adjacent to the ground and that the falling of the tree resulted from this fire which so weakened its body as to render it insufficient to sustain itself. After defendant had shown so much, plaintiff introduced numerous witnesses who gave testimony in rebuttal, over the objection and exception of defendant, to the effect that the tree had been a menace to the railroad for a considerable period of time. In other words, several witnesses testified in rebuttal for plaintiff that the tree

had been a hollow shell since 1871, at the time the railroad was constructed; that although it was green in the sense it was not a dead tree, it had been the home of rabbits which inhabited its interior for many years; that though the main body of the tree leaned southward, away from the railroad, a very large fork branched off eleven feet about the earth and leaned toward the railroad track; that this portion of the tree was about sixty-five feet in height, or sufficiently long to reach beyond the railroad in case it should fall. The tree was what is known as a bur oak and consisted of a very thin shell, which, including the bark, was only about two and one-half inches in thickness; that there were two considerable apertures in this hollow shell, one thirteen or fourteen inches wide and two and one-half feet high, adjacent to the ground on the southeast side and another not so large, a little above the ground on the northwest side of its body. This evidence was introduced in rebuttal on the theory that although the tree had fallen upon the track as a result of the fire therein, defendant had breached its obligation to exercise care for its passengers by permitting such a threatened danger to exist without having taken steps theretofore to remove it, and especially so, after having notice of the fire therein. In this connection, it was shown, too, by plaintiff in rebuttal the fire had smouldered in the hollow tree and emitted smoke for as much as six hours before it fell and that several of defendant's servants had passed it during the afternoon.

At the conclusion of all the evidence, defendant again requested the court to direct a verdict for it, on the theory that by showing the tree had fallen upon its track within thirty minutes before the collision and that it had no notice whatever of the obstruction, it had sustained the burden of wholly exculpating itself from negligence. This theory is advanced here in an argument to the effect that though it was defendant's duty to keep the track free from obstructions, the tree

which fell upon it was an extrinsic force over which defendant had no control. It is said the tree was an intruder and that by showing conclusively it fell upon the track immediately before the train came along this operated to repel the presumption of negligence which arose from the collision and acquitted defendant of the whole measure of its duty in the premises.

Just when the doctrine of *res ipsa loquitur* obtains and when it is repelled or overcome in view of all of the facts in judgment is not always clear, but in an early case the rule was formulated and it has been oftentimes repeated as follows:

"Where the thing is shown to be under the management of the defendant or his servants, and the accident is such as, under an ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendants, that the accident arose from want of care."

[*Scott v. Dock Co.*, 10 Jur. (N. S.) 1108; *Dougherty v. Mo. Pac. R. Co.*, 9 Mo. App. 478; *Mitchell v. C. & A. R. Co.*, 132 Mo. App. 143, 112 S. W. 291; *Trotter v. St. Louis & S. R. Co.*, 122 Mo. App. 405, 99 S. W. 508.] There can be no doubt that where the thing which occasions the injury is conclusively shown to have been one not under the management or within the control of the defendant the doctrine of *res ipsa loquitur* does not obtain. Indeed, the theory of the law in respect to this doctrine proceeds from the fact that the management or control of that which occasioned the injury is exclusively within the power of the defendant as between him and the plaintiff and that it works no injustice by requiring him to explain. In keeping with the principle referred to, it has been pointedly decided in this state that the presumption of negligence was conclusively repelled and overcome by a showing of fact to the effect the passenger received his injury from a stone hurled into the car by a sheer outsider, under circum-

stances which failed to suggest such an assault to the carrier. This is certainly sound, for though the passenger was entitled to high care from the carrier for his protection, there is no obligation to protect him from the criminal assault of persons in the street in no way connected with the carrier and which assault there was no reason to anticipate. [Woas v. St. Louis Transit Co., 198 Mo. 664, 96 S. W. 1017.] So, it has been decided that the presumption of negligence was repelled by a showing of fact to the effect the passenger came to her injury from a large boulder rolling down a mountain side, far removed from defendant's right of way, and falling upon the car. [Fleming v. Pittsburg, etc., R. Co., 158 Pa. St. 130; 3 Hutchinson on Carriers (3 Ed.), sec. 1414; 4 Elliott on Railroads (2 Ed.), sec. 1644.] However, these cases present situations which exclude every hypothesis of negligent conduct on the part of the carrier.

It cannot be the presumption of negligence is entirely overcome in every case by the carrier showing conclusively that the obstruction on the track was one not under its control, for there are such instances where the carrier is otherwise negligent and its negligence has operated proximately to occasion the obstruction on the track. Besides the high duty obtains against the carrier to maintain a clear track. In the case of Clark v. C. & A. R. Co., 127 Mo. 197, 29 S. W. 1013, the plaintiff was a passenger on the defendant's train and the defendant stopped the train at a point where another railroad crossed its tracks. A train on another and distinct road and over which the defendant had no control whatever ran into the car on which plaintiff was riding and injured him. It was argued for defendant that the collision was caused by a force beyond its control, to-wit, the tortious act of the Wabash railroad and that in such a case the doctrine of *res ipsa loquitur* did not obtain. The Supreme Court treated this argument as though it were entirely immaterial in the circum-

stances of the case, for it appeared the defendant had not acquitted itself of negligence in other respects. The court said it appearing defendant was negligent itself in stopping its train across the Wabash track, the presumption was not overcome because of the fact the Wabash train was not under its control. See, also, a forceful illustration, *O'Gara v. St. Louis Transit Co.*, 204 Mo. 724, 103 S. W. 54. So it has been held that where it appears the collision and derailment from which an injury is suffered was brought about by colliding with a cow or other animal, which was permitted to enter on the track, because of the dereliction of the carrier in respect of its duty to protect the road by fences from such intrusions, the presumption of negligence is not overcome, even though the animals are intruders. [*Louisville, etc., R. Co. v. Hendricks*, 128 Ind. 462; *Louisville, etc., R. Co. v. Ritter's Admr.*, 85 Ky. 368, 3 S. W. 591; *Sullivan v. Philadelphia, etc.*, 30 Pa. St. 234; *Mexican Central Ry. Co. v. Lauricella*, 87 Tex. 277, 28 S. W. 277.]

The theory of the law as portrayed throughout those cases is to the effect that the presumption of negligence obtains until the defendant has overcome and repelled the same by showing that it has discharged every obligation which the law has laid upon it to the end of insuring the safety of the passenger in the circumstances of the case. [See *O'Gara v. St. Louis Transit Co.*, 204 Mo. 724, 103 S. W. 54.] And this is highly just, for the spirit of the doctrine is that except for the carrier's negligence somewhere or some place, which contributed proximately to the injury, the accident would not have happened. In this view the Supreme Court of the United States in *Gleeson v. Virginia, etc., R. Co.*, 140 U. S. 435, declared that the presumption of negligence should be applied to, and it was not overcome by, the case made when it appeared the plaintiff's injury was occasioned by the carrier's train colliding with an obstruction on

the track which resulted from a landslide from one of its cuts on the roadway. In that case, it was reasoned that although the landslide was an intruder upon the track and one over which defendant then had no immediate control and of which it had no notice, it nevertheless might have been obviated by the exercise of high care on the part of defendant in inspecting the railroad cut before the landslide occurred. So, in Texas, the defendant's servant permitted a crippled bull to remain on the right of way after knowing its condition. It afterwards dragged itself upon the track and caused a derailment of the train. The court declares primary negligence against the defendant and said the facts did not repel the presumption. [Mexican Central Ry. Co. v. Lauricella, 87 Tex. 277, 28 S. W. 277.] The rule may, therefore, be said to be that the presumption of negligence which arises from the fact of a collision with an obstruction on the track, as in the circumstances of this case, continues to inhere with sufficient probative force to support a verdict until defendant has overcome it by not only showing that it had no notice of the particular obstruction but by showing as well that it was in no respect remiss in its duty in preventing the obstruction from finding its way on the track in the first instance. It obtains, too, until defendant shows it could not avoid the collision after it saw, or might have seen, the obstruction, by employing the appliances at hand. [O'Gara v. St. Louis Transit Co., 204 Mo. 724, 103 S. W. 54.]

But it is argued that no duty whatever rested upon defendant with respect to the tree in question. There can be no doubt of the proposition that the law enjoins the obligation of high care on a public carrier of passengers to look out for and remove such objects along and adjacent to its roadway as may threaten the safety of the passengers it undertakes to carry. Such we believe to be the doctrine which obtains throughout those jurisdictions where the common law prevails.

[Seymour v. Citizens' Ry. Co., 114 Mo. 266, 21 S. W. 739; 6 Cyc. 620; Francis v. New York Steam Co., 114 N. Y. 380, 21 N. E. 988, 23 N. Y. St. 543; North Chicago, etc., R. Co. v. Williams, 140 Ill. 275, 29 N. E. 672; Baltimore, etc., v. Leonhard, 66 Md. 70, 59 Am. Rep. 156, 5 Atl. 346; 2 Hutchinson on Carriers (3 Ed.), secs. 925, 947; Gleeson v. Virginia, etc., R. Co., 140 U. S. 435.

It is true these authorities relate more particularly to the obligation which obtains against the carrier as to threatening objects on its right of way but the indential rule obtains as well with respect to like objects standing so near the railroad right of way as to threaten injury to passengers unless they are entirely beyond the control of the carrier. In other words, if threatening objects, such as rotten and decayed trees, stand immediately adjacent to the railroad right of way and are sufficiently menacing to evince probable danger, the carrier must exercise high care as to them as well. In such circumstances, the carrier must remove menacing trees in accord with the precepts of humanity if he can do so without becoming a trespasser. In the spirit suggested, our statute (sec. 3049, R. S. 1909; sec. 1035, R. S. 1899; sec. 1035, An. St. 1906) has conferred authority on railroad companies to go in upon the lands of adjacent proprietors and remove such threatening trees by making compensation therefor. The statute referred to authorizes such corporation as defendant to enter upon the lands of any person and cut down any standing trees that may be in danger of falling on the road, making compensation therefor as provided in the chapter for lands taken for the use of the company. The statute is parcel of defendant's charter, and it lays a duty upon it accordingly. A like statute prevails in Texas and in a case where a tree upon the land of another had fallen across the railroad in that state, the Supreme Court declared it the duty of defendant to have looked out for and removed the tree

and that for its failure to do so, it should respond in damages for the breach. [T. & S. L. Ry. v. Vallie, 60 Tex. 481.]

There can be no doubt that besides the presumption of negligence above discussed, the evidence introduced by plaintiff in rebuttal tended to prove a breach of duty on the part of defendant with respect to permitting the tree to stand in its decayed and threatening condition for so many years, for it was obvious to one and all alike. Furthermore, the fire had smouldered in the tree for several hours and of this defendant's servants had ample notice. Besides, if the fire contributed, as it did, to the falling of the tree, defendant's negligence in permitting the threatening tree to remain standing adjacent to the road for so many years was proximate in that it concurred with the act of another in starting the fire to plaintiff's injury, and its liability may be sustained on that score. [Kinkead on Torts, sec. 57; O'Gara v. St. Louis Transit Co., 204 Mo. 724, 103 S. W. 54; Newcomb v. New York Central R. Co., 169 Mo. 409, 69 S. W. 348.]

As before stated, the court received evidence over defendant's exception tending to prove the tree which fell upon the track was a continual menace to the safety of those passing on the railroad, but this proof was received in rebuttal to that of defendant tending to show the obstruction was the result of a tree falling from land immediately adjacent to its right of way. By an instruction for plaintiff the court informed the jury, substantially, that though the collision occurred as a result of the tree adjacent to the right of way falling across the track immediately before the approach of the train, the finding should nevertheless be for plaintiff if it found the tree was greatly decayed and in danger of falling upon the track and had so been for a long time theretofore and that there was a fire burning therein, of which facts defendant had knowledge or might have had by the exercise or due care on its

part, and because of such decayed condition, fire and the weight of the tree it fell upon the track, etc. It is argued this instruction submitted a cause of action to the jury not pleaded in the petition, and the judgment should be reversed therefor. It is true the petition contains no pointed and express allegation as to the decayed and dangerous tree standing beside the right of way nor as to the smouldering fire therein, and there is no express averment that defendant had omitted its duty in respect of removing the tree before it fell. But the allegation of the cause of action, we believe, is sufficient in the circumstances of the case, for it is general to the effect defendant permitted a large tree to be and remain upon its railroad track and negligently ran its locomotive and train of cars into and collided with the same, to plaintiff's injury. The case is one where the presumption of negligence obtains and plaintiff was required to plead no more than the facts that he was a passenger on defendant's train and injured through a collision with an obstruction on its track. Upon pleading and proving so much, the burden was cast upon defendant to exculpate itself from all manner of negligence which operated to induce the injury. Until defendant had so relieved itself from fault, an element of liability obtained against it. [O'Gara v. St. Louis Transit Co., 204 Mo. 724, 103 S. W. 54.] Indeed, the cause of action relied upon under the general allegation referred to includes any and all derelictions on the part of defendant which operated proximately to breach defendant's duty in respect of its obligation to exercise high care for plaintiff's safety and this is the point of the whole matter. The accepted meaning of the term "cause of action" is that it signifies the plaintiff's primary right and the defendant's wrongful violation of that right. [Pomeroy's Code Procedure (4 Ed.), p. 459, sec. 346 *et seq.*; Litton v. C. B. & Q. R. R. Co., 111 Mo. App. 140, 149, 85 S. W. 978; Mellor v. Mo. Pac. R. Co., 105 Mo. 455, 470, 16 S. W. 849; Von Treba v. Gas

Light Co., 209 Mo. 648, 661, 108 S. W. 559; Hensler v. Stix, 113 Mo. App. 162, 88 S. W. 108.] We entertain no doubt whatever that in a case such as this, where the presumption of negligence obtains, the general allegation sufficiently comprehends the detail of the standing and decayed tree which operated to occasion the violation of plaintiff's primary right to a safe carriage, for its proof devolved the duty on defendant to exculpate itself from every manner of negligence which operated proximately to plaintiff's hurt. [Coudy v. St. L., I. M. & S. Ry. Co., 85 Mo. 79; Malloy v. St. L. & S. R. Co., 173 Mo. 75, 80, 81, 82, 73 S. W. 159; 15 Ency. Pl. and Pr. 1131, 1132; O'Gara v. St. Louis Transit Co., 204 Mo. 724, 103 S. W. 54.] After plaintiff's prima facie case was made by invoking the presumption of negligence, it devolved upon defendant, of course, to relieve itself from the charge and in so doing it was required to show not only that the tree recently fell upon the track but that it came there without any negligence on its part in other respects as well. To this end defendant first introduced the matter of the standing tree in the case and invited an issue thereabout, for it undertook to show its body leaned away from the railroad as though no danger were to be anticipated from its decayed condition. Having shown so much, no one can doubt the propriety of plaintiff showing the contrary by his proof in rebuttal; for in so doing, he directed attention to a detail about which defendant was negligent, even though the tree had theretofore been standing beside the right of way. Plaintiff's evidence in rebuttal which tended to prove the tree was decayed and a large portion of it leaned toward the railroad and was burning for six hours before, of which defendant's servants had constructive notice, at least, was entirely competent on the issue which defendant had introduced. The judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

BESSIE CHALMERS, Respondent, v. UNITED RAILWAYS COMPANY OF ST. LOUIS, Appellant.

St. Louis Court of Appeals, November 10, 1910.

1. **CARRIERS OF PASSENGERS: Street Railways: Injury to Passenger Alighting from Car.** Where plaintiff, a passenger on defendant street railroad company's car, was promised by the conductor that the car would stop at a usual stopping place, and, on the car's slowing down, stood on the step, holding to the handrail, but through a sudden jerk of the car, resulting from acceleration of speed, was thrown to the ground and injured, defendant was liable, plaintiff being entitled to rely on the conductor's invitation to be prepared to alight.
2. ———: ———: ———: **Ordinary Jerk.** In such a case, it was not a prerequisite to a recovery by plaintiff to show the jerk of the car was extraordinary or unusual, but to show an ordinary jerk was sufficient, *prima facie*, under the circumstances.
3. **RELEASES: Denial of Contract: Tender Not Necessary.** In an action for personal injuries, where the execution of a release pleaded in the answer is denied, there is no necessity of a tender of the amount alleged to have been received.
4. ———: **Rescission: Tender.** A tender of the amount received is a prerequisite only in those cases where plaintiff concedes that he executed the release and seeks to avoid it.
5. ———: **Execution: Jury Question.** In a personal injury action, whether plaintiff executed a release of damages and received and withheld an order on defendant's treasurer until after suit was brought, *held*, under the evidence, for the jury.
6. **EVIDENCE: Impeachment: Signed Deposition: Competency.** Where, though a deposition was not filed in a cause, it conclusively appeared to have been given by plaintiff and signed by her after hearing it read, any statement therein tending to contradict material statements made by her at the trial was competent to be received in evidence.
7. ———: ———: ———: **Cumulative.** Where extrajudicial declarations made by plaintiff are erroneously excluded, the error is harmless, if defendant succeeds in eliciting the same statements from plaintiff while she is a witness.

Appeal from St. Louis City Circuit Court.—*Hon. Eugene McQuillin*, Judge.

REVERSED AND REMANDED

Boyle & Pricst and *T. M. Pierce* for appellant.

(1) The court erred in refusing to give, at the close of the plaintiff's case and at the conclusion of the entire case, an instruction in the nature of a demurrer to the evidence, requested by the defendant. Because plaintiff failed to plead or prove that, before the institution of this suit, she had tendered back to the defendant the consideration for the release pleaded by the defendant. *Althoff v. St. Louis Transit Co.*, 204 Mo. 170. There was no evidence in the entire record that the jerk, which the plaintiff claimed threw her to the street and injured her, was unusual, extraordinary or more than incidental to operation. *Saxton v. Railroad*, 98 Mo. App. 503. (2) The court erred in refusing to permit defendant to cross-examine the plaintiff about her deposition, which had been taken previous to the trial, and which was offered by the defendant as a signed statement, though not filed as a deposition. *Glasgow v. Railroad*, 191 Mo. 366; 1 Current Law, p. 922, note 17; *Profile, etc., Co. v. Bickford*, 54 Atl. Rep. 669.

Benj. J. Klenc, *Richard F. Ralph* and *Ben J. Wolf* for respondent.

(1) It is the settled law of this state that a check, like a note, is never payment, except where an express agreement, that it was taken as payment, is shown. No such agreement was shown. *Selby v. McCullough*, 26 Mo. App. 66; *Wear v. Lee*, 26 Mo. App. 105; *Morrison v. McCartney*, 30 Mo. 183; *Chouteau v. Rowe*, 56 Mo. 67; *Leabo v. Goode*, 67 Mo. 126; *Riggs v. Goodrich*, 74 Mo. 112. A check is executory and revocable before payment. *Bank v. Bank*, 58 Mo. App. 17. (2) It is

not error to refuse defendant the right to cross-examine with the use of the deposition, because the matter to which her attention was sought to be directed was not in conflict materially with the testimony given by her on the stand. *Glasgow v. Railroad*, 191 Mo. 368. Because, after the refusal, defendant covered the matter to which it was desired to direct her attention in his examination, without the use of the so-called sworn statement, and this testimony is not in material conflict with the matter referred to in the so-called sworn statement. *Glasgow v. R. R.*, 191 Mo. 368.

NORTONI, J.—This is a suit for damages accrued to plaintiff on account of the alleged negligence of defendant in operating its street car. Plaintiff recovered and defendant prosecutes the appeal.

It appears plaintiff was a passenger on defendant's west-bound street car on Olive street in St. Louis. Having paid the car fare, the conductor furnished her with a transfer to be used on defendant's car running north on Jefferson avenue. It appears just before the car on which plaintiff was a passenger reached Jefferson avenue, she signalled the same to be stopped by ringing the electric bell, and walked to the rear end of the car with the purpose of alighting there. The car failed to stop in compliance with her signal, however, and she told the conductor she desired to go north on Jefferson avenue whereupon he said he would let her off at Beaumont, the next street to the west. Plaintiff says thereupon she assumed her position on the rear platform of the car to the end of stepping off when it should come to a stop at the next corner; that the car slowed down as it came to the corner of Beaumont and Olive streets as though it was going to stop for her to alight and she placed her foot upon the step, holding fast to the hand rail on the rear of the car. Just as she placed her foot upon the step, the car, instead of stopping, jerked sud

denly forward and precipitated her into the street, causing the several injuries complained of.

It is first argued for defendant that the court should have directed a verdict for it for the reason the evidence fails to show the jerk of the car which precipitated plaintiff to the street was extraordinary or unusual. The evidence in the record inheres with more force in this respect than defendant concedes; for besides that of plaintiff to the effect the car gave a sudden and unexpected jerk, a passenger testified that it jerked him backwards against his seat with a considerable jar. But we are not impressed with the argument advanced for the reason that even an ordinary jerk of the car is sufficient *prima facie* in the circumstances of the case. It appears the whole matter occurred under the very eye of the conductor who had promised plaintiff the car would be stopped at the corner of Beaumont and Olive streets, only a block away, for her to alight. The point mentioned is a usual stopping place for street cars and plaintiff was thus invited by the conductor in charge to be present and prepare to alight. Instead of the car stopping, as the conductor agreed, it did no more than slow down, indicating the stop was being made. Plaintiff had a right to rely upon this invitation and assume her position adjacent to the step, if she exercised ordinary care for her safety by holding fast to the hand rail as the evidence discloses. Having thus induced plaintiff to assume the position she occupied it would seem that the exercise of high care for her safety forbade any acceleration of speed which would tend to suddenly jerk the car and precipitate her into the street. Plaintiff had a right to anticipate the car would stop at the point in question and not be suddenly moved forward without warning after she was invited to assume a position of readiness to alight. The principle of liability is more or less illustrated in the following cases: *Jones v. Springfield Traction Co.*, 137 Mo. App. 408, 118 S. W. 675; *Westervelt v. St.*

Louis Transit Co., 222 Mo. 325, 121 S. W. 114; Groshong v. United Railways Co., 142 Mo. App. 718, 121 S. W. 1084.

The answer pleaded a release and acquittance of the cause of action relied upon in the petition. It is averred that in consideration of five dollars paid plaintiff she released and acquitted defendant of all claims for damages arising from her injury. Plaintiff's reply, which was verified under our statute, requiring as much when the execution of a written instrument is not conceded, denied that she released or acquitted defendant of the claim involved and averred that she had no knowledge whatever touching the release set forth in the answer. It appears in evidence that defendant's general manager had issued an order upon its treasurer, payable to plaintiff, in the sum of five dollars and there was evidence on the part of defendant that this order was delivered to plaintiff at the time she is said to have executed the release. But the evidence of plaintiff herself on this question goes to the effect that no such order was ever delivered to her and that she had no knowledge whatever of the release in question. Plaintiff's sister testified for her to the effect that the morning after the injury, defendant's claim agent called to see plaintiff but was not permitted to do so for the reason her injuries were so severe that an interview could not be allowed; that the claim agent presented a paper and requested her to sign it to the end that he might show he had called upon her. This witness said that she refused several times to sign the paper but finally, in order to get rid of the agent, who was persistent, she signed her sister's (plaintiff's) name thereto without authority and without knowing the contents of the paper. After the paper was so signed by plaintiff's sister, the claim agent left with the witness the order on defendant's treasurer for five dollars. It appears this order was never cashed and if plaintiff's evidence is to be believed, she had no knowledge of it whatever.

It is argued the court should have directed a verdict for defendant for the reason the reply did not aver she had tendered the five dollars to defendant before instituting the suit and, especially so as the evidence failed to disclose the order for that amount was tendered until after the suit was instituted. According to the theory of the case as presented by plaintiff in her reply, no contract of release was ever executed by her or with her knowledge. If this be true, then, of course, there was no contract to rescind or cancel and no tender of the amount was required. Indeed, if the evidence of plaintiff and her sister is to be believed, there was not only an absence of a contract of release but nothing had been received by her thereunder. When the execution of the release is entirely denied and it appears no payment was made to plaintiff thereunder, there is certainly no necessity for a tender either before or after suit is instituted. As we understand the law, a tender of the amount received is a prerequisite only in those cases where plaintiff concedes there has been a release executed and it is sought to be evaded, for in such circumstances the case presented is one for rescission of a contract, and not the denial of a contract of release *in toto*. [See Dwyer v. Wabash R. Co., 66 Mo. App. 335; Malkmus v. St. Louis Portland Cement Co., 150 Mo. App. 446, 131 S. W. 148.] For reasoning by the Supreme Court on the question, see Och v. M. K. & T. R. R. Co., 130 Mo. 27, 31 S. W. 962. It is clear enough on the case presented by plaintiff's reply and the proof made for her, that a tender was not an essential prerequisite to maintaining the suit, but the question as to whether or not plaintiff executed the release and received and withheld the order on defendant's treasurer for five dollars until after the suit was instituted is for the jury, to be tried out under proper instructions.

After the suit was instituted, defendant gave notice and took plaintiff's deposition before a notary public.

Plaintiff's attorney appeared with his client at the taking of her deposition and participated therein. After the deposition was completed, it was read over to plaintiff and she affixed her signature thereto. The deposition was never filed in the cause, but defendant's counsel sought to cross-examine plaintiff with respect to certain statements she made therein. The use of the deposition for this purpose was objected to by counsel for plaintiff on the ground that the deposition had never been filed in the cause and because it was taken before a notary public who was an employee of defendant's general counsel. Counsel for defendant disclaimed any purpose to introduce the deposition in evidence, as it had never been filed in the cause in accordance with the statute, but insisted upon his right to cross-examine and confront plaintiff with respect to certain statements made therein as against her interests. The court, nevertheless, sustained plaintiff's objection and denied defendant's right to use the deposition even for the purpose of cross-examination to the end of contradicting material statements made by plaintiff at the trial. This was error. Though the deposition was not filed in the cause, it conclusively appeared to have been given by plaintiff and signed by her after hearing it read over, and any statements contained therein which tended to contradict material statements made by her at the trial were competent to be received in evidence. [Glasgow v. Met., etc., Ry. Co., 191 Mo. 347, 366, 368, 369, 89 S. W. 915.] Indeed had plaintiff made an ex parte statement out of court or written a letter contradictory to any material testimony she gave on the trial, it would have been competent for defendant to cross-examine her touching the matter as an admission against interest. Plaintiff's counsel concedes error in this respect, however, but argues that by cross-examining plaintiff, defendant's counsel elicited the same statements from her which he sought to show by the use of the deposition. We believe there can be no doubt that if defend-

ant had succeeded in eliciting all of the contradictory statements against plaintiff's interest from her while on the witness stand that were sought to be shown by the deposition, the judgment should not be reversed for this error alone. But upon examining the statements of plaintiff in her deposition, about which defendant sought to cross-examine and which it sought to introduce in evidence as matter of impeachment, it appears she made several statements in the deposition highly favorable to defendant and contradictory of her testimony at the trial, which were not elicited from her while on the witness stand. Indeed, it appears in the portions of the deposition referred to, plaintiff testified that she fell off the car in the middle of the block after it passed Beaumont street while it was running at eight miles an hour. If this statement were believed by the jury to be true, the finding would probably have been for defendant, as it contradicted the entire theory of her case. This statement was material to defendant for it tended to show that instead of being jerked from the car while at a usual stopping place, when she had a right to suppose the car was in the very act of stopping, as agreed by the conductor, she was remiss in her duty to exercise ordinary care for her own safety by riding on the step for a half block beyond, when the car was proceeding at a high rate of speed. Enough has been said to dispose of the important points in the appeal and it is not necessary to give judgment on other questions presented. If other errors there be, they may not occur on a retrial. For the error mentioned, the judgment should be reversed and the cause remanded. It is so ordered. *Reynolds, P. J., and Caulfield, J., concur.*

MARY L. APPLGATE Respondent, v. TRAVELERS INSURANCE COMPANY OF HARTFORD CONN., Appellant.

Reargued and Submitted October 24, 1910. Opinion Filed November 10, 1910.

1. **JURISDICTION: Court of Appeals: Federal Constitution Invoked.** Under section 12, article 6, Constitution of Missouri, and section 5 of the Amendment thereto of 1884, giving the Supreme Court jurisdiction in cases involving the construction of the state or federal Constitution, the Court of Appeals is without jurisdiction of a cause where a question open for consideration involving the construction of the federal Constitution is properly presented by the record.
2. ———: ———: **Constitutional Question: Effect of Previous Adjudication.** The Court of Appeals has jurisdiction to determine a case in which a constitutional question is raised, when such question has been settled by the adjudications of the Supreme Court.
3. ———: ———: ———: ———: **Life Insurance: Constitutionality of Section 6945.** It having been determined by both the federal and state Supreme Courts that section 6945, Revised Statutes 1909, which provides that suicide shall be no defense to an action on a life insurance policy, is not violative of the Fourteenth Amendment to the federal Constitution, that question is no longer an open one in this state, so that the Court of Appeals has jurisdiction of an appeal, although that question was raised by appellant in the court below.
4. ———: ———: ———: **Arising on Judgment of Lower Court: Review.** Whether a constitutional question is presented for the determination of the appellate court, when such question arises for the first time on the decision or judgment of the lower court, is not very clear, under the decisions of the Supreme Court of this state, but it is settled in the affirmative by the decisions of the federal Supreme Court.
5. **ACTION: Defense: What is.** Whatever tends to diminish plaintiff's cause of action, or to defeat a recovery in whole or in part, amounts in law to a defense.
6. **LIFE INSURANCE: Suicide: Statute.** Under section 6945, Revised Statutes 1909, declaring that suicide shall be no defense to an action on a life insurance policy, the suicide of insured

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does not give a cause of action, but a cause of action arises on the policy, as interpreted by the statute, by reason of the death of insured, this interpretation being, that when the death of insured occurs from suicide, the beneficiary shall recover the full amount of the insurance.

7. ———: ———: ———: **Applies to Accident Policy.** Section 6945, Revised Statutes 1909, declaring that suicide shall be no defense to an action on a life insurance policy, applies to a suit on an accident policy insuring against death from bodily injuries effected through external, violent and accidental means, within ninety days from the date of the injuries.
8. ———: ———: ———: ———: **Facts Stated.** An accident insurance policy provided that insurer would pay the beneficiary a stipulated sum in the event of the death of insured, effected through external, violent and accidental means, within ninety days from the date of the injuries, and that in the event of the death of insured, caused by poison, insurer would pay only one-tenth of the amount otherwise payable. Insured committed suicide by taking poison. In an action to recover the full amount of the insurance, defendant pleaded it was liable for one-tenth of the amount only, for the reason its liability was so limited in the policy, in the event of death by poison. *Held*, that under section 6945, Revised Statutes 1909, insurer was liable for the full amount sued for, since the policy, as interpreted by the statute, provides that when death occurs from suicide, whether accomplished by poison or otherwise, the beneficiary shall recover the full amount insured for.

Appeal from St. Louis City Circuit Court.—*Hon. Hugo Muench*, Judge.

AFFIRMED.

Watts, Williams & Dines and *Wm. R. Gentry* for appellant.

(1) The policy sued on expressly provides that, in the event of death by poison, the company shall pay but one-tenth of the amount otherwise payable. It was entirely competent for the insured and insurer to contract for an indemnity of one amount for death or injuries resulting from certain causes, and for a different amount where death or injury is due to other causes, or the accident happens under specified circumstances,

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or at designated places. *McAndiless v. Insurance Co.*, 45 Mo. App. 578; *Mossop v. Continental Casualty Co.*, 118 S. W. 680; *Shader v. Railroad*, 66 N. Y. 441; *Standard Co. v. Jones*, 94 Ala. 434; *Campbell v. Insurance Co.*, 60 S. W. 492; 1 Cyc. 257; 4 Cooley's Briefs, 3175. (2) Section 7896 of the statutes has no application. It provides that suicide shall not constitute a defense to a suit upon a policy of insurance on life—not that it shall authorize a recovery where death by suicide is caused by means, under circumstances, at a place, or in a manner not covered by the policy. The statute does not give a cause of action on account of the suicide. It only provides that where, under the terms of the contract, a liability would exist if death had occurred in the same manner and from the same causes if there had been no suicide, then suicide shall constitute no defense. R. S. 1899, sec. 7896. (3) The policy in this cause provides an indemnity of a specified amount in case of death by poison. This is not confined by the contract to poison taken with suicidal intent. It includes all cases where death results from poison and cannot be said to have been inserted as a mere subterfuge to avoid the statute. *McGlother v. Insurance Co.*, 89 Fed. 685, 32 C. C. A. 318; *Early v. Insurance Co.*, 113 Mich. 58; *Hill v. Insurance Co.*, 22 Hun 187; 1 Cyc. 264; *Pollock v. Insurance Co.*, 48 Am. Rep. 204. This is also apparent from the fact that an exception of liability *in toto*, in case of suicide, is inserted in another clause of the policy. It also appears that the contract provides a different indemnity for various accidents, which is entirely reasonable, as the insured might be exposed more frequently to accidents of one kind than another; or the insurer might be willing to accept the risk for one kind, at a specified premium, and only a limited risk for another class for the same premium. (4) The statute, as construed by the trial court, is vio-

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lative of the Fourteenth Amendment of the Federal Constitution. The right to contract is a property right protected by this amendment. The insurer and the insured made a contract fixing a specific amount to be paid in case death should be caused by poison. Presumably the premiums were made with a view to that liability. The Legislature may prohibit certain contracts, but there must be something in the nature of the contract itself to justify the exercise of such power. It may not be arbitrarily used. *State v. Julow*, 129 Mo. 163.

Charles H. Brock for respondent.

(1) The fact that the policy contains a clause providing for one-tenth payment of the full face value of the policy, does not save it from being in violation of the suicide statute of this state, if construed so as to apply to this case. *Kellar v. Insurance Co.*, 58 Mo. App. 557; *Whitfield v. Life Insurance Co.*, 205 U. S. 489. (2) If the poison clause of the Applegate policy can possibly be construed to apply to suicidal death by taking poison, said construction or meaning of the clause would be directly opposed and contrary to the suicide statute of the State of Missouri which has been held to apply to accident insurance companies and their policies. R. S. 1899, sec. 7896, ch. 119; *Logan v. Fid. and Cas. Co.*, 146 Mo. 114; *Berry v. Knights Templar*, etc., 46 Fed. Rep. 439; s. c. upon appeal, 50 Fed. Rep. 511; *Elliott v. Safety Fund Life Association*, 76 Mo. App. 562; *Jarman v. Knights Templar Association*, 95 Fed. Rep. 70, 104 Fed. Rep. 638; 187 U. S. 199. (3) The statute (section 7896, R. S. 1899) is mandatory and obligatory, and it cannot be waived or abrogated by any form of contract or by any device whatever. *Kellar v. Ins. Co.*, 58 Mo. App. 557; *Berry v. Knights Templar*, 46 Fed. Rep. 439; *Whitfield v. Life Ins. Co.*, 205 U. S. 489. (4) To say that the poison clause in the policy

applies to a case of suicide by the use of poison would, in effect, be making the suicide of the insured a defense. Whatever tends to diminish the plaintiff's cause of action in a case of suicidal death or to defeat a recovery, in whole or in part, amounts in law to a defense. *Whitfield v. Life Ins. Co.*, 205 U. S. 489. (5) The claim in a motion for a new trial that section 7896, R. S. of Missouri as construed by the court, is violative of the Fourteenth Amendment of the Constitution of the United States, is but another way of stating that the court's construction of the statute is violative of the Federal Constitution, and this does not involve in the record a constitutional question. *Petring v. Current River L. & C. Co.*, 111 Mo. App. 373; *Hilgert v. Asphalt Pav. Co.*, 173 Mo. 319; *Schwyhart v. Barrett*, 122 S. W. 1049; *Sublette v. Railroad*, 198 Mo. 190; *Vaughn v. Railroad*, 145 Mo. 57; *White L. S. Com. Co. v. Railroad*, 157 Mo. 518; *Carey v. Schultz*, 221 Mo. 133.

STATEMENT.—The plaintiff in this cause, respondent here, brought her action against the defendant, appellant here, stating as a cause of action that she was the wife of one Oliver H. Applegate, and that the defendant is a corporation created, organized and existing under and by virtue of the laws of the State of Connecticut, but engaged in the business of selling contracts in life insurance in the State of Missouri and having its office in the city of St. Louis. That in consideration of the payment to it by Oliver H. Applegate of fifteen dollars, defendant executed and delivered its policy of insurance in writing, whereby it insured the life of Applegate in the sum of three thousand dollars, for the benefit of his wife, plaintiff, for a term of twelve months from the 23d of March, 1904, with the privilege of renewing the policy from year to year on the payment by Applegate at each renewal of the sum of fifteen dollars; that according to the terms of the policy of insurance, defendant agreed to pay plaintiff, in event of the death

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of Oliver H. Applegate, four hundred and fifty dollars in addition to the principal sum of three thousand dollars, provided the policy of insurance was renewed for three consecutive years after the first period of twelve months; that Oliver H. Applegate renewed the policy for a period of three years by the payment to the defendant of the sum of fifteen dollars for each renewal period of one year, as aforesaid. It is further averred in the petition that the defendant, through its policy, stipulated and agreed with Oliver H. Applegate, hereafter called the insured, that in event of the death of the insured from bodily injuries effected through external, violent, and accidental means, within ninety days from the date of the injuries, it would pay to the plaintiff the sum of \$3450, provided the death occurred during the third renewal period of the policy of insurance, and provided further that the policy was in full force at the time of the death of the insured. The petition further avers that the policy provided that in the event of the death of the insured, loss of limb or sight, or disability caused by gas, vapor or poison, the company shall pay but one-tenth of the amount otherwise payable for bodily injuries to the insured, anything to the contrary in said policy notwithstanding. It is further averred that the insured died on the 18th of November, 1907, at St. Louis, "by suicide committed by said Oliver H. Applegate by drinking a liquid poison known as carbolic acid;" that up to the time of his death all the premiums accrued and due upon the policy had been duly paid and the insured had complied with its conditions and provisions. Notice to the company and proof of death is averred, and it is averred that the defendant had offered to pay plaintiff one-tenth part only of the amount, but had declined and refused to pay her the remaining nine-tenths part of the amount claimed to be due on the policy, to-wit, \$3105; that no part of the full amount of \$3450 had been paid. For this amount, with interest and costs, judgment is prayed. The policy sued on was,

as averred in the petition, filed with it and marked Exhibit "A."

In the answer the defendant admits that plaintiff was the wife of Applegate; that it (defendant) is a corporation, organized under the laws of Connecticut; that it issued the policy sued on and that the policy filed as Exhibit "A" is the one referred to, "but the defendant expressly denies that it ever issued to said Oliver H. Applegate any life insurance policy." It further admits that Applegate died in the city in St. Louis, on the day alleged, from the effects of a poison known as carbolic acid, which he drank on that date. Admits that proofs had been duly furnished by plaintiff of the death of Applegate, as required by the policy. Admits "that it was provided in said policy of insurance above referred to in this answer, that in the event of the death of the said Oliver H. Applegate, loss of limb or sight, or disability caused by gas, vapor or poison, the defendant should pay but one-tenth of the amount otherwise payable under the terms of the policy; anything to the contrary in said policy notwithstanding." It is then averred "that under the terms of the policy if the death of the said Oliver H. Applegate had resulted wholly from external, accidental and violent means other than the inhaling of gas or vapor or taking of poison on November 18, 1907, this defendant would have been liable to the plaintiff for the sum of \$3450, and this defendant says that by said clause above referred to, it was expressly provided that if the death of the insured . . . was caused by poison the limit of this defendant's liability under said policy should be one-tenth of the principal sum thereof; that is to say the limit of its liability should be \$345. This defendant therefore says that inasmuch as the death of the deceased, Oliver H. Applegate, was caused by carbolic acid, which is a poison, this defendant at the date of the death of said Oliver H. Applegate became liable to the plaintiff in the sum of \$345 only." It then avers

that it tenders and brings into court this sum with interest on it from the date of the death of the insured and tenders the sum to plaintiff, "in full payment and settlement of defendant's liability under the terms of said policy of insurance, as expressly agreed therein," and offers to allow judgment to be entered in favor of plaintiff against the defendant for that sum, \$354.77, with costs of suit to the date of filing the answer. All other allegations of the plaintiff's petition are denied.

It appears by the abstract of the record that on the day of filing this answer, defendant by leave of court paid into court the above sum and had paid all costs accrued to that date.

A reply was filed admitting that the insured died as the result of taking carbolic acid, a poison; that it was taken by the insured with the purpose on his part of committing suicide and that the act of taking it was a suicidal act which resulted in the death of the insured. It is further averred that the policy of insurance, Exhibit "A," is a policy of insurance on the life of Oliver H. Applegate and that by reason of the aforesaid facts plaintiff is entitled to judgment against defendant for the full amount as prayed for in the petition. All other allegations in the answer are denied, and plaintiff declining to accept the sum tendered and refusing to accept judgment in her favor for the amount tendered and costs, again prays for judgment for the full amount sued for, namely \$3450 and interest and costs.

The case was tried on an agreed statement of facts before the court, a jury being waived. The agreed statement of facts is embodied in the bill of exceptions and set out in the abstract. The contract of insurance or policy is embodied and set out in full. It is dated March 23, 1904. Summarizing it, it sets out, among other matters, that in consideration of the warranties thereafter set forth and of fifteen dollars, the defendant company insured Oliver H. Applegate for the term of twelve months from March 23, 1904, "against bodily in-

juries effected through external, violent, and accidental means, as specified in the schedule below," the principal sum of the first year being \$3000, with 5 per cent increase annually for ten years, amounting to \$4500, each consecutive full year's renewal of the policy adding 5 per cent to the principal sum of the first year until such additions shall amount to fifty per cent and thenceforth, so long as the policy is maintained in force, the insurance would be for the original sum plus the accumulations theretofore granted. The schedule of indemnities followed. That designated as "Part A," is for loss of life; of both hands by severance at or above the wrist; of both feet by severance at or above the ankle; of one hand and one foot at those places; of entire sight of both eyes if irrecoverably lost; it being set out that in any of these events the principal sum is payable. For loss of either hand by severance at or above the wrist; of either foot by severance at or above the ankle; of entire sight of one eye if irrecoverably lost, one-third that sum, and that, "In event of death the principal sum insured shall be paid to Mary L. Applegate (plaintiff), wife (the beneficiary), if surviving, otherwise to the executors, administrators, or assigns of the insured." Then follows what is designated as "Part B," and headed "Weekly Indemnity," providing for the payment of fifteen dollars a week for total loss of time and six dollars for partial loss of time. "Part C," provides that the amounts to be paid for claims under "Part A and B" shall be double the sum specified in this schedule, if such injuries are sustained while riding as a passenger and being actually in or upon any railway passenger car, using steam, cable or electricity as a motive power or in a passenger elevator or while traveling as a passenger on board a steam vessel or any regular line for transportation of passengers, or caused by the burning of a building while the insured is therein. The above matter appears on the front or first page of the

policy. On the back of this first page, under the heading "Special Payments," appears this as "Part D:—"

"In the event of death caused by sunstroke or freezing, or caused by bodily injuries of which there exists no external visible contusion or wound upon the body sufficient to cause death (accidental drowning only excepted), or in event of death or disability caused by hernia produced by external and accidental violence, the company shall pay but one-half of the amount otherwise payable hereunder for bodily injuries covered hereby, anything to the contrary in this policy notwithstanding."

Under the sub-head "Part E" is this:

"In the event of death, loss of limb or sight, or disability caused by gas, vapor, or poison, or by injuries intentionally inflicted upon the insured by any other person, sane or insane (except assaults committed for purposes of burglary or robbery), the company shall pay but one-tenth of the amount otherwise payable for bodily injuries covered hereby, anything to the contrary in this policy notwithstanding."

"Part F," after stipulating for payment for necessary surgical operations in certain events, contains nine provisos. The first, second and third are immaterial in this case. The fourth sets out that the insurance shall not cover, among other happenings, "disappearance, or suicide sane or insane, or injuries of which there is no visible mark on the body, . . . nor shall it cover accident, injury, death, loss of limb or sight, or disability, resulting . . . wholly or partly, directly or indirectly . . . from disease in any form, . . . self-inflicted injuries, war or riot or voluntary over-exertion or from voluntary exposure to unnecessary danger." The fifth, sixth, seventh and eighth are not material to this case. The ninth clause is printed on the third page, and sets out "that all the warranties made by the insured upon acceptance are true," following which are specifications as to age, occupation, hab-

its, earnings, etc. The fourth page or back sets out the benefits to the beneficiary, a table of income, and is endorsed "Accident Policy on Life of Oliver H. Applegate," with name of defendant, dates, etc. These are all the matters appearing on or in the policy deemed necessary to be set out for an understanding of the points here involved. The agreed statement further admits that all premiums had been paid on the policy and all its terms and conditions complied with by the insured, up to the time of his death and that the policy was in full force and effect on that date, to-wit, the 18th of November, 1907, and that on the 18th of November, 1907, Oliver H. Applegate committed suicide in the city of St. Louis, State of Missouri, by drinking a liquid poison known as carbolic acid and that death was caused by the poison; that due notice of his death had been given by plaintiff to the defendant and that she had furnished proper proofs of death, all as required by the terms and conditions of the policy.

No declarations of law appear to have been asked or given.

The court found in favor of plaintiff and against defendant for \$3632.85, that being the principal sum of \$3450, with interest amounting to \$182.85, for the period between commencing the action and the date of the judgment. Motion for new trial was duly filed, in which the usual assignments of error are made, while the third ground assigned is that "the finding and judgment of the court in the case is in violation of the Fourteenth Amendment of the Constitution of the United States of America, in that it abridges the privileges and rights of the defendant in this case and denies to it the equal protection of the laws by abridging its right to contract." The fourth ground of the motion for new trial is because section 7896, "as construed by this court in its finding and judgment in this case, is unconstitutional in that it is in violation of the Fourteenth Amendment of the Constitution of the United States of Amer-

ica because it abridges the rights of an insured and an insurance company to make a contract concerning life insurance and accident insurance, and denies to insurance companies the equal protection of the laws." This motion was overruled, exception being duly saved. Defendant thereupon prayed for an appeal, the affidavit for appeal, made by the attorney and agent for defendant, setting out that a constitutional question is involved in this case and therefore defendant prayed the court, that in granting an appeal, it would grant it to the Supreme Court of the state. The affidavit otherwise is in the usual form. The trial court refused to grant an appeal to the Supreme Court and made an order granting it to the St. Louis Court of Appeals, to which action of the court in refusing to grant its appeal to the Supreme Court instead of to the St. Louis Court of Appeals, as appears by the bill of exceptions set out in the abstract, defendant, by counsel, then and there duly excepted. The case is here on that order, defendant appealing.

REYNOLDS, P. J. (after stating the facts).—The brief submitted to us along with the argument in this case by the learned counsel for the appellant, while containing no formal assignments of error, makes four propositions: First, that it was entirely competent for the insured and insurer to contract for an indemnity of one amount for death or injuries resulting from certain causes and for a different amount where death or injury is due to other causes, or the accident happens under specified circumstances or at designated places. Second, that section 7896, of the Statutes of 1899, now section 6945, Revised Statutes 1909, has no application, it being claimed that that section provides that suicide shall not constitute a defense to a suit on a policy of insurance on life, not that it shall authorize a recovery where death by suicide is caused by means, under circumstances, at a place, or in a manner not covered by

the policy; that the statute does not give a cause of action on account of the suicide, but only provides that where under the terms of the contract, the liability would exist if death had occurred in the same manner and from the same causes, if there had been no suicide, then suicide shall constitute no defense. Third, that the policy in this cause provides an indemnity of a specified amount in case of death by poison and this provision cannot be said to have been inserted as a mere subterfuge to avoid the statute, it being claimed that this is also apparent from the fact that an exception of liability *in toto* in case of suicide is inserted in another clause of the policy, and that it also appears that the contract provides a different indemnity for various accidents which is entirely reasonable as the insured might be exposed more frequently to accidents of one kind than another, or the insurer might be willing to accept the risk for one kind at a specified premium and only a limited risk for another class for the same premium.

The fourth point, to quote the language of counsel, is that "the statute, as construed by the trial court, is violative of the 14th amendment to the Federal Constitution. The right to contract is a property right protected by this amendment. The insurer and the insured made a contract fixing a specific amount to be paid in case death should be caused by poison. Presumably the premiums were made with a view to that liability. The Legislature may prohibit certain contracts, but there must be something in the nature of the contract itself to justify the exercise of such power. It may not be arbitrarily used."

The printed argument submitted is divided into two paragraphs or heads, the first dealing with the three points above specified and the second being based on the fourth. In point of fact, the whole argument goes to the validity of the contract, the right of parties to contract, a right claimed to be under the protection of

the Constitution of the United States, the corollary following, that the judgment of the trial court has taken away or abridged this right, hence a construction of the Constitution of the United States is involved, as it is claimed. The case has been orally argued twice before this court, the first time when Judge Goode was a member, the second time before the court as now constituted.

Our right to determine this case on appeal is involved in the fourth point of counsel. It is proper to say that a motion to transfer the case to the Supreme Court was heretofore filed in this cause, based on the ground of want of jurisdiction of this court over the appeal. The point was very fully briefed by the learned counsel for appellant as well as for respondent, and with the concurrence of all the members of the court as then constituted, that motion was overruled, without, however, filing any opinion and without stating any reasons which had led us to that conclusion. As the point is again before us, both by brief and on the record, we feel bound to consider it. If there is a question open for consideration, involving the construction of the Constitution of the United States, and that question has been properly preserved by the record, not only is the case outside of our jurisdiction, but, if we determine the case adversely to the appellant, its right to have it heard before the Supreme Court of the United States on writ of error sued out to this court, is clear. [Wabash R. R. Co. v. Pearce, 192 U. S. 179.] While in that case the Supreme Court of the United States called attention to the fact that its jurisdiction over final judgments of the state courts is not identical with, but is more unlimited than is that of our state Supreme Court, referring to section 709, Revised Statutes United States, the right of review granted to our state Supreme Court by the Constitution is, so far as involved in the case at bar, as broad as is that of the Federal Court, our Constitution giving our Supreme Court sole appellate

jurisdiction, among other cases named, "in cases involving the construction of the Constitution of the United States or of this state," only lodging appellate jurisdiction, however, "in cases where the *validity* of a treaty or statute of or authority exercised under the United States is drawn in question" (Const., sec. 12, art. 6; sec. 5, Amendment of 1884 to Constitution), while the Supreme Court of the United States has jurisdiction in cases involving the *construction* of a law, treaty, etc., of the United States. [Tennessee v. Davis, 100 U. S. 257.] This is undoubtedly the difference referred to in Wabash R. R. Co. v. Pearce, *supra*.

Our Supreme Court, in Logan v. Field, 192 Mo. 54, l. c. 66, 90 S. W. 127, held that a constitutional question is properly raised, when first set up by the motion for a new trial. [See, also, Saxton National Bank v. Bennett, 138 Mo. 494, l. c. 500, 40 S. W. 97; City of Independence v. Cleveland, 167 Mo. 384, 67 S. W. 216.]

Whether an appeal lies to the Supreme Court of our state from a construction of a statute by the trial court, when it is claimed that construction brings the statute in conflict with the Constitution of this state or that of the United States, and hence involves a construction of either Constitution, is not very clear.

In State ex rel. Smith v. Smith et al., 152 Mo. 444, 54 S. W. 218, which was an application for mandamus requiring the Kansas City Court of Appeals to transfer a cause to the Supreme Court, Judge VALLIANT, speaking for the Supreme Court in Banc, after saying that the question involved in the case when pending in the Kansas City Court of Appeals was, which law is to govern, the Act of the Legislature of 1874, or the Kansas City Charter of 1889, and that the Kansas City Court of Appeals had decided that the Charter was adopted pursuant to the provisions of the Constitution authorizing cities of a certain population to frame a charter for its own government, consistent with and

subject to the Constitution and laws of this state, said (l. c. 448): "All of which is the interpretation which that learned court places on the provision of the Constitution above quoted, and through that interpretation, and reasoning along that line, it reached the conclusion that as between the Charter provisions in question and the Act of 1874, the latter must prevail. . . . Undoubtedly there is involved in this case a construction of the Constitution, and as this is decisive of the case there is no necessity for considering the other points." The peremptory writ, requiring the Kansas City Court of Appeals to send the case to the Supreme Court was accordingly awarded. This appears to be a distinct decision that when the constitutional question arises on the decision or judgment of the court, appeal lies to the Supreme Court.

It is true that our Supreme Court, in *Sublette v. St. L., I. M. & S. R. Co.*, 198 Mo. 190, 95 S. W. 430, held (l. c. 192) that "the Courts of Appeal have as much right to construe statutes as has this court, if construction of such is demanded in the course of decision of cases coming properly within their jurisdiction," and that in such cases, an appeal does not lie to the Supreme Court.

In *Schwyhart v. Barrett*, 223 Mo. 497, l. c. 500, 122 S. W. 1049, and again in *Chastain v. Railroad*, 226 Mo. 94, l. c. 97, Judge VALLIANT delivering the opinion of the Court in Banc in the former, has, however, very clearly drawn the distinction between the construction of an Act of Congress and the determination of its validity, holding that the Supreme Court is vested with appellate jurisdiction only in cases in which is involved the validity of the act, not its construction. In none of these cases, however, is the case of *State ex rel. Smith v. Smith et al.*, supra, referred to or cited by the court, so that while there are expressions in the *Sublette* case and in the *Schwyhart* case, as well as in the cases of *Vaughn v. Wabash R. R. Co.*, 145 Mo. 57, 46 S. W. 952:

Hulett v. Railroad, 145 Mo. 35, 46 S. W. 951; Hilgert v. Barber Asphalt Paving Co., 173 Mo. 547, 73 S. W. 475, and perhaps in others, that seem to hold contrary to what is said in *State ex rel. Smith v. Smith et al.*, it does not appear that this latter case has been overruled; it is cited approvingly in *Lohmeyer v. Cordage Co.*, 214 Mo. 685, 113 S. W. 1108, and *Sheets v. Ins. Co.*, 226 Mo. 613, and recognized as stating a correct rule in *Woolley et al. v. Means et al.*, 226 Mo. 41.

Whatever uncertainty or doubt may arise as to the true position of our own Supreme Court on this matter, the ruling of the Supreme Court of the United States has uniformly been to the effect that a case arises under the Constitution of the United States, and hence within the jurisdiction of that court, not merely where a party comes into court to demand something conferred upon him by the Constitution and laws of the United States or a treaty, or authority exercised "under the United States, but whenever its correct decision as to the right, privileges or defense of a party, in whole or in part, depends upon the construction of either; that violation or disregard of the constitutional provisions, where made by the judicial tribunals of a state, may be, and generally will be, after the trial has commenced; that it is during or after the trial, that denials of a defendant's right by judicial tribunals occur and not often until then; nor can the defendant know until then that the equal protection of the laws will not be extended to him: certainly, until then, he cannot affirm that it is denied, or that he cannot enforce it in the judicial tribunals of the state. [See *Tennessee v. Davis*, 100 U. S. 257; *Virginia v. Rives*, 100 U. S. 313; *Ex parte Virginia*, 100 U. S. 339; *Neal v. Delaware*, 103 U. S. 370; *Bush v. Kentucky*, 107 U. S. 110; *Yick Wo v. Hopkins*, Sheriff, 118 U. S. 356.]

The weight of authority, certainly that of the Supreme Court of the United States, seems to be in favor of the rule that a claim to the protection of the Con-

stitution of the state or the United States can be made, and is not made too late, when the right or privilege claimed is thought to be denied by the judgment of the court, and that the right to invoke the protection of the Constitution arises and can be asserted, if properly made, as against the decision which is claimed to have invaded the right.

But it is not necessary for us to undertake to reconcile the decisions on this point in the case at bar, as, in our judgment, another proposition brings this case clearly within our appellate jurisdiction.

In the case of *Meng v. Railroad*, 183 Mo. 68, 81 S. W. 907, Judge MARSHALL, speaking for Division No. 1, Judges BRACE and VALLIANT concurring in the result only, held that the fact that the Supreme Court, by a former decision in one case had upheld the constitutionality of a verdict by nine jurors in a civil case, did not eliminate that constitutional question from another case, when it was properly raised. This opinion was delivered in the *Meng* case after the same division of the court, in the case of *Lee v. Jones*, 181 Mo. 291, 79 S. W. 927, Judge VALLIANT delivering the opinion, Judges BRACE and ROBINSON concurring *in toto* and Judge MARSHALL concurring in the result, had determined that the Supreme Court, having decided that under our Constitution three-fourths of the jurors in a civil suit in a court of record may render a valid verdict, therefore "that is no longer a constitutional question in this state." In the later cases of *State v. Campbell*, 214 Mo. 362, 113 S. W. 1081, and *Lohmeyer v. Cordage Co.*, supra, l. c. 688, involving the Local Option Law, it is held that where the constitutionality of a law has been determined and settled by a long line of decisions, the court would decline to further consider the case as one within its appellate jurisdiction, the constitutional question being the sole one upon which the appellate jurisdiction of that court depended. Without being aware of this later decision, and acting under what we

supposed to be the latest decision of the Supreme Court on the question, that is *Meng v. Railroad*, *supra*, this court, in the two cases of *State v. Cowan*, transferred them to the Supreme Court, on the ground that they involved the construction of the Constitution of this state and of that of the United States, as applied to the Local Option Law of this state. [See *State v. Cowan*, 146 Mo. App. 621, 124 S. W. 586; *State v. Cowan*, 146 Mo. App. 656, 124 S. W. 587.] The Supreme Court, however, has recently transferred each of these cases back to this court, no opinion accompanying the order of transfer, obviously proceeding on the theory that the validity of the Local Option Law having been settled by previous decisions, its validity was no longer open to attack as unconstitutional. While it is true that our Supreme Court in the case of *State ex rel. Campbell v. St. Louis Court of Appeals*, 97 Mo. 276, 10 S. W. 74, held that the Court of Appeals was without jurisdiction to determine constitutional questions, when fairly raised by the record, while reserving to itself the right "to determine all jurisdictional questions," *Sheets v. Ins. Co.*, *supra*, 615, its later decisions in the two cases last referred to, unmistakably and clearly mean that it holds, that this court is to proceed in the determination and adjudication of cases before it, even if a constitutional question is raised, when that constitutional question has been settled by the adjudications of the Supreme Court; that it presents a case in which, in the language of the court in *Lee v. Jones*, *supra*, "there is no longer a constitutional question in this state."

The precise constitutional point sought to be raised in this case, and which, it is claimed, presents a case of violation of the provisions of the 14th amendment to the Constitution of the United States, resolved into its ultimate conclusion is, that the statute, as interpreted by the trial court, violates that amendment in that it deprives the defendant of the equal protection of the laws

and violates the right of freedom of contract between the defendant company and the insured. This point has been so thoroughly settled, as to this particular form of insurance contracts, that is accident insurance, both by the decisions of the Supreme Court of this state and of that of the United States, that it may be said to be no longer a constitutional question in this state.

Our Supreme Court, in *Cravens v. New York Life Insurance Co.*, 148 Mo. 583, 50 S. W. 519, held that an insurance contract, executed in this state, is subject to the laws of this state, anything in the contract to the contrary notwithstanding; that foreign insurance companies, doing business in this state, do so not by right but by grace, and must, in so doing, conform to the laws of this state; that the state may prescribe conditions upon which it will permit such companies to transact business within its borders, or may exclude them altogether, and in so doing violates no contractual rights of the company, and that the statute with respect to the subject-matter, in force at the time the contract is entered into within this state, becomes a part of the contract as much as if copied into it. This case was carried by writ of error to the Supreme Court of the United States and the decision of that court will be found in 178 U. S. 389, under the title *New York Life Insurance Company v. Cravens*. The decision of the Supreme Court of the United States followed and affirmed that of the Supreme Court of this state, holding (l. c. 401) that the power of a state to impose conditions upon foreign corporations is as extensive as the power over domestic corporations, citing and referring to *Hooper v. California*, 155 U. S. 648. [See, also, *Ordelle v. Modern Brotherhood*, 226 Mo. 203, l. c. 211.] This same principle was later announced by the majority of our Supreme Court in *Julian v. Kansas City Star Co.*, 209 Mo. 35, l. c. 67, 107 S. W. 496, and by the Supreme Court of the United States in *Northwestern Life Ins. Co. v. Riggs*, 203 U. S. 243, where Mr. Justice HAR-

LAN, delivering the opinion of the court says (l. c. 254) : "The state may well say to its own corporate creatures engaged in the business of life insurance that they shall not refuse to pay what they agreed to pay, simply because of some representations made by the insured which did not actually contribute to the contingency or event upon which the agreement to pay depended. If a life insurance corporation does not approve such a restriction upon the conduct of its affairs, it is its privilege to cease doing business. . . . That Missouri could forbid life insurance companies of other states from doing any business whatever within its limits, except upon the terms prescribed by the statute in question, cannot be doubted in view of the decisions of this court." In the same case, Mr. Justice HARLAN, referring to this very section of our statute, that is section 7896, says (l. c. 255) : "As the present statute is applicable alike to all life insurance companies doing business in Missouri, after its enactment, there is no reason for saying that it denies the equal protection of the laws. Equally without foundation is the contention that the statute, if enforced, will be inconsistent with the liberty guaranteed by the Fourteenth Amendment. The liberty referred to in that amendment is the liberty of natural, not artificial persons, nor in any true, constitutional sense, does the Missouri statute deprive life insurance companies doing business in that state of a right of property. This is too plain for discussion."

It seems to us that this eliminates the constitutional question entirely from this case, and so effectually as not to leave that open for either discussion or decision in the case at bar. Many other decisions of our own Supreme Court and of that of the United States, holding practically to the same effect might be cited, but the above decisions are so conclusive that it would be a work of supererogation to do so. We accordingly hold that the constitutionality of section

7896, Revised Statutes 1899, now section 6945, Revised Statutes 1909, as that section was construed by the learned trial judge, is not an open question in this state, and consequently that we have jurisdiction to determine this case on its merits.

Nor have we any doubt, considering the case on its merits, that the view which the learned trial court took of the policy, as tested by section 7896, of the statutes, is correct. This court, in *Keller v. Travelers' Ins. Co.*, 58 Mo. App. 557, our Supreme Court in *Logan v. Fidelity & Casualty Co.*, 146 Mo. 114, 47 S. W. 948, and the Supreme Court of the United States in *Whitfield v. Aetna Ins. Co.*, 205 U. S. 489, as well as in *Northwestern Life Ins. Co. v. Riggs*, *supra*, and *Knights Templar & Masonic Life Ins. Co. v. Jarmon*, 187 U. S. 197, have, in our opinion, settled the main points of contention in this case against the appellant.

An examination of the briefs and arguments of counsel and of the opinions of the United States Circuit Court (125 Fed. Rep. 269) and of the United States Circuit Court of Appeals (144 Fed. Rep. 356), in the *Whitfield* case demonstrates that the arguments advanced here by the learned counsel for the appellant are practically the arguments advanced by counsel and the position taken by those two distinguished courts, when the *Whitfield* case was under consideration and decided by those courts. Those arguments, as well as decisions, were conclusively met and overturned by the decision of the Supreme Court of the United States when the *Whitfield* case reached it under writ of certiorari directed to the Circuit Court of Appeals.

As the decisions of this court and that of our Supreme Court above referred to are accessible to the bar of this state, it is unnecessary to do more than cite those cases. The *Whitfield* case being in the reports of the United States Supreme Court and not always accessible to the profession out in the state, it is thought not improper to notice it at length. It was an action

upon an accident policy of insurance, issued by a company incorporated under the laws of Connecticut, doing business in this state by authority of our laws. The policy specified various kinds of injuries entitling recovery of compensation, also the amount that would be paid by the company on account of such injuries respectively. It provided that if death resulted solely from such injuries within ninety days, the company would pay the principal sum of five thousand dollars to the beneficiary, and recited that it was issued to and accepted by the assured, subject to certain conditions. Among these conditions, so far as germane to the case at bar, is this, that in the event of death, loss of limb or sight or disability due to injuries intentionally inflicted upon the insured by any other person (except assaults committed for the sole purpose of burglary or robbery), whether such other person be sane or insane, or under the influence of intoxicants or not; or due to injuries received while fighting or in a riot; or due to injuries intentionally inflicted upon the insured by himself; or due to suicide, sane or insane; or due to the taking of poison, voluntarily or involuntarily, or the inhaling of any gas or vapor; or due to injuries received while under the influence of intoxicants or narcotics, then in all such cases above referred to, the limit of the company's liability "shall be one-tenth the amount otherwise payable under this policy, anything to the contrary in this policy notwithstanding." The plaintiff in the case, widow and beneficiary, alleged in her petition that the insured had died from bodily injuries effected through external, violent and accidental means and by a pistol shot, and demanded judgment for the full amount of the policy, with interest. The company, defendant, in its answer denied liability for the whole principal sum, and averred, among other things, that by the terms of the policy, in the event of death being caused by intentional injuries, inflicted by the insured, or while fighting, or in a riot, or by suicide, sane or insane, or by poison, or

by inhaling gas or vapor, that the amount to be paid should be one-tenth of the principal sum, and that the insured had died from bodily injuries caused by a pistol shot fired by himself for the purpose of taking his own life; that the cause of the death of said Whitfield was suicide. The plaintiff demurred to the answer. The demurrer was overruled and plaintiff filed a reply admitting that the insured died from bodily injuries caused by a pistol shot fired by himself and that the cause of his death was suicide, averring that he was insane when he committed the act. The case was tried, as was the case at bar, on an agreed statement of facts, it being admitted, among other things, that the insured died from bodily injuries caused by a pistol shot intentionally fired by himself, for the purpose of taking his own life, and that the cause of his death was suicide. The Circuit Court of the United States for the Western District of Missouri, in which the case was tried, found for defendant, holding that the plaintiff was entitled to recover only five hundred dollars, that being ten per cent of the total amount insured, and entered judgment for that amount. The opinion of the court being by Judge PHILLIPS, sitting as circuit judge, is reported in 125 Fed. 269. That judgment was affirmed by the Circuit Court of Appeals of the Eighth Circuit and is reported 144 Fed. 356. The case was taken to the Supreme Court of the United States upon writ of certiorari. Stating the case as above, Mr. Justice HARLAN delivered the opinion of that court, there being no dissent by any of the associate justices. In his opinion the learned justice says, among other things, after quoting section 7896, Revised Statutes 1899, now section 6945, Revised Statutes 1909, that assuming that the insured committed suicide without having contemplated self-destruction at the time he made application for insurance, the question arises as to whether the contract of insurance limiting the recovery to one-tenth of the principal sum specified was valid and enforceable. After

holding that the statute is a legitimate exercise of power by the state, "provided it does not, in so doing, come into conflict with the Constitution of the state or the Constitution of the United States, Mr. Justice HARLAN says: "There is no such conflict here. The legislative will, within the limits stated, must be respected, if all that can be said is that, in the opinion of the court, the statute expressing the will is unwise from the standpoint of the public interests." Examining the proposition advanced by the Circuit Court of Appeals, and on which that court had adjudged that the policy in suit was not forbidden by the statute, Mr. Justice HARLAN takes up the question of whether an insurance company and the insured can lawfully stipulate that in the event of suicide not contemplated by the insured when applying for the policy, the company shall be bound to pay not the principal sum insured but only a given part thereof, and says: "Will the statute, in a case of suicide, allow the company, when sued on its policy, to make a defense that will exempt it, simply because of such suicide, from liability for the principal sum?" He concludes that the Supreme Court cannot agree with the learned courts below in their interpretation of the statute. "The contract between the parties, evidenced by the policy," says Mr. Justice HARLAN, l. c. 496, "is, we think, an evasion of the statute and tends to defeat the object for which it was enacted. In clear, emphatic words the statute declares that in *all* suits on policies of insurance on life it shall be *no* defense that the insured committed suicide, unless it be shown that he contemplated suicide when applying for the policy. Whatever tends to diminish the plaintiff's cause of action or to defeat recovery in whole or in part amounts in law to a defense. When the company denied its liability for the whole of the principal sum, it certainly made a defense as to all of that sum except one-tenth. If, notwithstanding the statute, an insurance company, may by contract, bind itself, in case of the suicide of

the insured, to pay only one-tenth of the principal sum, may it not lawfully contract for exemption as to the whole sum or only a nominal part thereof, and if sued, defeat any action in which a recovery is sought for the entire amount insured? In this way the statute could be annulled or made useless for any practical purpose. Looking at the object of the statute, and giving effect to its words, according to their ordinary, natural meaning, the legislative intent was to cut up by the roots any defense, as to the whole and every part of the sum insured, which was grounded upon the fact of suicide. The manifest purpose of the statute was to make all inquiry as to suicide wholly immaterial, except where the insured contemplated suicide at the time he applied for his policy. Any contract inconsistent with the statute must be held void," referring to *Berry v. Knights Templars' etc., Co.*, 46 Fed. 441, and *Knights Templars' Indemnity Co. v. Jarmon*, 187 U. S. 197, as cases in which the scope and effect of the statute were in question and noting that the view of that statute, as taken by counsel in those cases, was not accepted by the circuit court, and that its judgment against the company for the whole sum insured was affirmed in the Supreme Court of the United States. Mr. Justice HARLAN also refers to *Logan v. Fidelity & Casualty Co.*, 146 Mo., supra, and quotes from it extensively, and also refers to and quotes from *Keller v. Travelers' Insurance Company*, 58 Mo. App., supra, as cases very much in point, quoting from each of them approvingly, and concludes his opinion thus (l. c. 501): "Without further discussion we adjudge that under the statute in question—anything to the contrary in the policy notwithstanding—where liability upon a life policy is denied simply because of the suicide of the insured, the beneficiary of the policy can recover the whole of the principal sum, unless it be shown that the insured, at the time of his application for the policy, contemplated suicide." The judgment of the Circuit Court of Appeals and that of the Circuit

Court of the Western District of Missouri were reversed and the cause remanded for further proceedings in accordance with the opinion.

It may be further said that the clause of the policy providing for the payment of ten per cent of the amount insured in case of death by gas, vapor or poison, construed in connection with the clause in the policy which provides that in case of suicide, there can be no recovery under the policy, means that the first provision is against an accidental killing and not suicide. Even if that is so, it is no defense under the statute. This, however, is not a case of accident, but of design—a case of suicide by poison.

In the argument of this case at bar, as well as by printed brief, the learned counsel for the appellant suggest that the statute was not applicable because defendant had not set and was not setting up suicide as a defense. Literally, this is not true; the answer carefully and skillfully avoids that. But this argument is effectually disposed of in an opinion of the Supreme Court of the United States in the Whitfield case, *supra*, where, to repeat, Justice HARLAN says at page 496, "Whatever tends to diminish the plaintiff's cause of action or to defeat recovery in whole or in part amounts in law to a defense." It is immaterial that the defense was anticipated by the petition and that the answer does not, in terms rely on suicide as a defense. The present action is to recover the whole amount specified in the policy. Appellant here, defendant below, is defending against that. While it is true that it does not in terms and by its answer set up suicide as a defense to the policy, it is beyond question that it is defending against a recovery for the whole amount of the policy, on the ground that the insured died from taking poison. Whether he took that poison accidentally or of purpose is not material here. If the fact that he died from the effect of poison, which it is admitted he took with suicidal intent, is not urged by the appellant as defense against the

action, then it follows that it is before the court without having interposed any defense whatever in this case. It seems a rather narrow argument to say that while the answer avers the insured died by poison, and stops there, that therefore the defendant has, by its pleading, cut out and eliminated the statute, although in fact it appears by agreed facts that the insured took the poison with suicidal intent. This is hardly even specious: it certainly is not sound. The argument is also advanced that suicide does not give a cause of action. That is true. The cause of action arises on the policy as interpreted by the statute and by reason of the death of the insured. The policy, as interpreted by the law and by the courts, does provide that when death occurs from suicide, whether that suicide is accomplished by poison or by shooting, the beneficiary shall recover for the full amount insured to be paid by reason of death occurring. The statute eliminates suicide as a defense. The contention apparently made by the answer, that this section 7896 applies to life policies alone and not to accident, was disposed of by our Supreme Court in the case of *Logan v. Fidelity & Casualty Co.*, *supra*, against this contention. Upon the record the judgment of the circuit court should be and it accordingly is affirmed. *Nortoni, J.*, and *Caulfield, J.*, concur.

**SUSIE S. ROSE, Respondent, v. FRANKLIN LIFE
INSURANCE COMPANY, Appellant.**

St. Louis Court of Appeals, November 29, 1910.

- 1. APPELLATE PRACTICE: Review: Sufficiency of Exceptions.**
In a trial to the court, the failure of defendant to except to special findings of fact made by the trial court will not prevent the appellate court from reviewing the action of the trial court in overruling a demurrer to the evidence, which action was excepted to.
- 2. LIFE INSURANCE: Forfeiture for Non-Payment of Premiums: Statutes: Construction of Technical Terms.** In construing sec-

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tion 7897, Revised Statutes 1899, which provides that policies of insurance on life shall not be forfeited by reason of non-payment of premiums where three-fourths of the net value of the policy is sufficient to secure temporary insurance, etc., "net value" is a technical term, and is to be taken in its technical sense.

3. **STATUTES: Construction of Technical Terms: Question for Court.** In construing a statute, the meaning of technical terms is a question for the court, and it may determine their meaning by consulting books of reference, or by referring to persons who have knowledge on the subject.
4. ———: ———: **Settled Meaning.** In construing a statute containing technical terms, it is important to ascertain whether the words had a settled technical meaning before the statute was enacted, as, in that case, it will be assumed the Legislature used them in that sense.
5. ———: **Construction of Remedial Statute: Evils to Be Corrected.** In construing a remedial statute, the mischievous practice or evil intended to be terminated or cured by its enactment may be considered.
6. **LIFE INSURANCE: Net Value.** "Net value" or "reserve," in life insurance, existed long before either by contract or statute any part of it was devoted to extended insurance.
7. ———: **Premiums: Cost of Insurance Defined.** The cost of insurance for a single year of insured's life is the sum which the company must actually receive from the insured and augment with interest in order to meet the probability of insured's dying during that year, according to the mortality table, and such cost is greater with increasing age, because the probability of death grows greater.
8. ———: **"Net Value:" Defined.** The "net value" of a life insurance policy is the accumulation of the balance of past net premiums not absorbed in carrying the risk.
9. ———: ———: **Statute.** The "net value" of a policy of life insurance, under section 7897, Revised Statutes 1899, represents nothing but premiums actually collected from the policyholder in excess of the tabular costs up to the time of default, with interest added at the rate of four per cent per annum compounded.
10. ———: **Gross and Net Premiums Defined.** The "net premium" of a life insurance policy is the amount required to be paid by insured to meet the tabular cost and is figured to be the exact amount required to carry the insurance from period to period. "Gross premium" is the amount actually charged by the insurer under the contract, and usually exceeds the net

premium by the addition of a certain "loading" for the profit and expenses of the company.

11. ———: **Net Value: Gross Premiums to Be Applied.** All money received by an insurance company as gross premiums on a life insurance policy must be applied toward the payment of the net level premium—that is, the tabular cost of insurance and the creation of the reserve which the form or class of the policy makes proper—before any part may be appropriated by the company for profit or expense.
12. ———: ———: **Method of Computing: Statute.** In computing the net value of a life insurance policy, under section 7897, Revised Statutes 1899, the policy must not, contrary to its terms, be treated as an "ordinary whole life policy" in which the premiums are level and fixed and payable at set intervals throughout the continuance of the risk.
13. ———: ———: ———: ———: **Evidence: Based on False Premises.** In an action on a life insurance policy, under section 7898, Revised Statutes 1899, providing for non-forfeiture because of lapse, etc., the evidence of an actuary as to the net value of a policy, based upon computations founded on an erroneous construction of the statute's requirements as to the elements of the computation, was wholly worthless.
14. ———: ———: **Method of Computing.** The net value of a life insurance policy is not greater in proportion to the smallness of the premium because the insured receives a greater benefit for his money, and the same reasoning applies to the departmental practice and the statutes intended to secure the solvency of insurance companies, such as section 6925, Revised Statutes 1909, which charges them as a liability with a reserve sufficient to meet all policy obligations and declares that if a policy does not provide for the payment of a sufficient net level premium to create a proper reserve, according to the form of the policy, the company shall supply the sufficiency out of its available assets.
15. ———: **Action on Policy: Forfeiture for Non-Payment of Premiums: Net Value Held Insufficient to Carry Policy.** In an action on a life insurance policy, prosecuted on the theory that, notwithstanding insured had defaulted in the payment of premiums, three-fourths of the net value of the policy at the time of the lapse was sufficient, when used as a single net premium, as contemplated by section 7897, Revised Statutes 1899, to provide temporary insurance to the time of insured's death; *held*, the evidence did not establish that the policy had such value.

Rose v. Life Insurance Co.

Appeal from Lincoln Circuit Court.—*Hon. James D. Barnett*, Judge.

REVERSED.

Jones, Jones, Hocker & Davis and *O. H. Avery* for appellant.

The judgment on both counts should have been for the defendant. *Mutual Reserve v. Roth*, 122 Fed. 853; *Westerman v. K. P.*, 196 Mo. 711; *Gessner v. Railway Co.*, 137 Mo. App. 47; *Statham v. Insurance Co.*, 93 U. S. 34; *Relfe v. Insurance Co.*, 76 Mo. 603; *Rumbold v. Insurance Co.*, 7 Mo. App. 73; *State v. Vandiver*, 213 Mo. 187; *Conn. Ins. Co. v. Commonwealth*, 133 Mass. 164.

Wm. A. Dudley for respondent.

(1) The policy is a Missouri contract and the non-forfeiture law—R. S. 1899, secs. 7897-7899—is part of the contract. *Cravens v. Ins. Co.*, 148 Mo. 599; *Whittaker v. Ins. Co.*, 133 Mo. App. 664; *Price v. Ins. Co.*, 48 Mo. App. 281; 2 May of Ins., sec. 344 b. (2) No exceptions to the findings of fact were made, filed or overruled, and therefore none to an order overruling exceptions to the findings. They fully sustain the judgment and are conclusive. *Bank v. Barbee*, 198 Mo. 469; *Leavitt v. Taylor*, 163 Mo. 170; *Grain Co. v. Becker*, 76 Mo. App. 379; *Ins. Co. v. Tribble*, 86 Mo. App. 546; *Gilmore v. Harp*, 92 Mo. App. 77; *Steele v. Johnson*, 96 Mo. App. 147, 156; *Rauch v. Michel*, 192 Mo. 293; *Burgess v. Ins. Co.*, 114 Mo. App. 169. (3) The policy was properly construed as a whole life policy on its face and under the evidence as to what is meant by "term" and "whole life" policies. 1 May on Ins. (3 Ed.), sec. 179c, p. 366; *S. W. Cotton Press Co. v. Hall*, 26 Mo. 386; *Walsh v. Transportation Co.*, 52 Mo. 434; *Baer v. Glaser*, 90 Mo. App. 289; *Realty Co. v. Moynihan*, 179 Mo. 642; 12 Cyc., p. 1082, par. c; 9 id., p. 578, par. 3.

STATEMENT.—This is an action on a policy of life insurance for two thousand dollars issued to Thomas

M. Rose on the 2d day of July, 1900. The plaintiff is his widow and the beneficiary in the policy.

The said policy contained provisions in substance as follows:

"The Franklin Life Insurance Company hereby promises to pay \$2000 on the receipt of satisfactory proofs of death of Thomas M. Rose, provided this policy is then in force, to Susie S. Rose, if living.

This insurance is granted in consideration . . . of the payment in advance of \$36.54 and of the payment of a like amount on or before the second day of July in every year following until premiums for the term of five years have been duly paid; and of the further payment of the life rate premium of \$70.80, on or before the date above mentioned in every year thereafter during the continuance of this policy.

In case of default of any premium after one full year's life rate premium has been paid in cash, the company will:

(a) Without action of the insured continue the full amount of insurance during the time specified in the following table. . . .

(b) Upon due surrender of this policy within sixty days after such default, issue a non-participating paid-up life policy, as specified in said table; and after this policy has been in force one year under life-rate, the company will loan the value stated in the following table.

(And the policy contained the table of loan, temporary or continued insurance and paid-up insurance values referred to in the foregoing provisions.)

Failure to pay any renewal premium of this contract will render it null and void.

A grace of one month will be allowed in the payment of premiums."

At the date of said policy, Thomas M. Rose was forty-three years of age and his age was so stated in the

policy. He paid to the defendant the five annual premiums of \$36.54 falling due on the second day of July of the years 1900 and 1904, inclusive and no more. He made default of premium, and the policy by its terms lapsed on July 2, 1905. After such default and lapse he lived two years, ten months and six days, dying May 8, 1908. Proof of death was waived.

The trial was to the court. No declarations of law were asked or given. There was a written finding of facts made pursuant to request under the statute. On the same day, judgment was rendered for plaintiff for \$1818.68 being the amount of the policy, \$2000 with six per cent interest from date of suit, less three unpaid annual premiums of \$70.80 each with 6 per cent interest compounded annually from the dates when they respectively became due.

After unsuccessful motions for new trial and in arrest, the defendant appealed.

Other facts deemed necessary to be understood will appear in the opinion proper.

CAULFIELD, J. (after stating the facts).—The suit was brought and prosecuted by plaintiff upon the theory that the policy, notwithstanding the lapse, had, at the time of lapse, a net value, three-fourths of which was sufficient when used as a net single premium (as contemplated by sec. 7897, R. S. 1899) to provide temporary insurance for the time that intervened between lapse and death, and the question which we deem decisive of this appeal is whether the policy had such net value.

The defendant raised the question by demurring to the evidence at the close of the plaintiff's case and again at the close of all the evidence, and this was overruled, defendant duly excepting to such action of the court.

Defendant also attempted to raise this question by suggesting for the first time in its motion for a new trial that the court erred in certain of its findings of facts.

Plaintiff disposes of this suggestion by pointing out that defendant did not except to said findings and therefore cannot complain of them as such. However this may be, we can find no authority, and plaintiff cites us to none, holding that a failure to except to special findings of fact closes the door of investigation as to whether the trial court erred in its rulings during the trial. The failure to except to the findings will not prevent us reviewing the action of the trial court in overruling the demurrer to the evidence, which action was excepted to.

We are satisfied upon reading the record that there is really no controversy as to the facts. The case upon said demurrer turns upon the meaning of the term "net value" as used in the statute, section 7897, Revised Statute 1899, which is admittedly applicable, and which, omitting parts not important to this controversy, is in substance as follows:

"Policies non-forfeitable, when.— No policies of insurance on life . . . shall, after payment upon it of three annual payments, be forfeited or become void, by reason of non-payment of premiums thereof, but it shall be subject to the following rules of commutation.

The net value of the policy, when the premium becomes due, and is not paid, shall be computed upon the actuaries' or combined experience table of mortality, with four per cent interest per annum, and . . . three-fourths of such net value . . . shall be taken as a net single premium for temporary insurance for the full amount written in the policy; and the term for which said temporary insurance shall be in force shall be determined by the age of the person whose life is insured at the time of default of premium, and the assumption of mortality and interest aforesaid."

The words "net value" being technical words are to be taken in their technical sense. [Sutherland, Statutory Construction, sec. 393; sec. 8057, R. S. 1909.]

Their meaning is for the court, who may ascertain their meaning by referring to persons who have knowl-

edge on the subject or by consulting books or reference containing information thereon. [Sutherland, Statutory Construction, sec. 391.]

It is important to ascertain whether the words had a settled technical meaning before the statute was enacted as in that case we must assume that the Legislature used them in that sense. [Ruckmaboye v. Motticund, 8 Moore (P. C.) p. 20.]

It will also aid and should greatly influence us to a correct interpretation of the statute and the sense in which it uses the words "net value", to ascertain the mischievous practice or evil intended to be terminated or cured by its enactment. [Westerman v. Supreme Lodge Knights of Pythias, 196 Mo. 670, 711, 94 S. W. 470.]

What is known in the language of life insurance as "net value" or "reserve" as it is sometimes called, existed long before either by contract or by statute any part of it was devoted to extended insurance. [State v. Vandiver, 213 Mo. 187, 111 S. W. 911.]

It seems that the cost of insurance for a single year of the insured's life is the sum which the company must actually receive from the insured and augment with interest in order to meet the probability of the insured dying during that year, according to the mortality table. Such cost is greater with increasing age because the probability of death grows greater. Thus if a man is insured at age 99 the cost of \$1000 insurance, ignoring interest, would be \$1000, because the table assumes that the insured will die during that year. At age 98 the cost is \$750, because the probability of death in that year is less. At age 43 the cost is only \$11.25.

And it has been said that "the simplest form of carrying on the business of life insurance would be for the company to charge the policy-holder each year with the sum which it costs to insure him for that year." [Connecticut Ins. Co. v. Commonwealth, 133 Mass. l. c. 164.] The insurer and the insured would be concerned

only with the cost to be paid during and for the year based upon the probability of the insured dying that year. If at the end of the year the insured abandoned the contract, he would have had his insurance and the insurer would have been paid for having carried the risk. The cost of carrying the risk would have exactly equalled the money paid to cover it. The account between the insurer and the insured would stand balanced.

But the insurance companies did not follow that simple plan. It became the general practice to ascertain in advance what these increasing yearly costs would average each year throughout an average life, and to charge each year such average sum. Necessarily, under this practice, during the earlier years the insured paid more than it cost to insure him for those years. Such payments in excess made in earlier years were really payments in advance by the insured to accumulate a fund applicable to the larger cost of his insurance in later years. The same result might have been obtained if he had deposited the excess in a savings bank. Hence the insurer has been, properly, we think, likened to a savings bank for the insured in respect of this fund. [New York Life Ins. Co. v. Statham et al., 93 U. S. 24, 35; Connecticut Ins. Co. v. Commonwealth, 133 Mass. 161, 165.]

Augmented by interest the fund thus created swelled the net premiums receivable of the future to their proper size and made them sufficient to meet increased cost of their time. The statute under discussion is said to have been borrowed from Massachusetts. [Westerman v. Supreme Lodge Knights of Pythias, 196 Mo. 670, 711, 94 S. W. 470.] The Supreme Court of that state has said: "It is this feature of the business (the excess payment accumulation) which gives existence to "net values" within the meaning of our statutes; the net value of a policy being represented by a sum which, with compound interest at the rate of four per cent per

annum, and with the addition of future net premiums, will provide for the payment of the policy when it matures, according to the 'combined experience' or actuaries' table of mortality." [Connecticut Ins. Co. v. Commonwealth, 133 Mass. 161.]

Now if nothing had occurred to mar the relations of insurer and insured and the policy had continued to its maturity, the insured paying premiums and the insurer carrying the risk, this "net value" or "reserve" would have been used as originally contemplated, that is, toward making sufficient the insufficient payments of later years. Or if all insurers had returned the fund called "net value" to its owner, the insured, when the insurance contract ceased on account of lapse, or if, as some insurers did voluntarily, all insurers had applied the fund toward purchasing extended insurance for the benefit of the insured, then no injustice would have resulted, and no non-forfeiture law would have been needed. But the insurance companies did not all follow this benevolent and just practice. On the contrary, the appropriation of these funds, by insurance companies, became a source of considerable profit to them. The savings of the insured were frequently confiscated. It was to remedy this unfair practice that the non-forfeiture law was enacted. [Mutual Reserve Life Ins. Co. v. Roth, 122 Fed. Rep. 853, 857.] The insurance companies were to be prevented from taking all the money that had been paid in excess by the policy holder without giving value for it. They were to be compelled to give him temporary insurance for such a period beyond the lapse as three-fourths of the fund created by his excess of payments was sufficient to pay for. The purpose was to prevent the insurance company taking something it was not entitled to.

There is nothing in the definitions given by the actuarial witnesses in this case conflicting in the slightest degree with the foregoing.

Mitchell, plaintiff's only actuarial witness, said that "net value" "as known in actuarial science, may be variously defined." He then gives one of the definitions as follows: "'Net value' is the difference between the net single premium at the attained age (the age at which lapse occurred) and the present value at that age of future premiums receivable."

An analysis of this definition shows that it comprehends the same accumulation of excess premium payments we have discussed. "Net single premium" is really only the aggregate of the future yearly costs of the insurance, severally discounted to the age from which the computation is made. If the net future premiums are less than said aggregate of costs, there will be a deficiency or difference to be made up. Actuarial science assumes that they will not be less and there will be no difference unless the averaging system is resorted to; that is, unless the future premiums are made less to average with the earlier premiums which were made more. The difference is necessarily equal to the fund accumulated from earlier excess of payments. All of which is no more than saying that "net value" is "the accumulation of the balance of past net premiums not absorbed in carrying the risk" which last definition is apparently recognized by the actuaries as being equally correct with the one given by Mitchell, to which they all agree. Both definitions mean the same thing, and followed as formulae produce exactly the same result.

Plaintiff's actuary, Mitchell, corroborates our impression by conceding that if this policy is to be regarded as "term" insurance for the first five years, (in which case it is assumed that there would be no accumulation from past payments at the end of the five year term), with a provision for renewal as a whole life policy for the remainder, there would be no difference between the net single premium and the future net premiums, and hence no net value to the policy.

We consider it well settled that the net value of a

policy under sec. 7897, represents nothing but premiums actually collected from the policy holder in excess of the tabular costs up to the time of default, with four per cent per annum compound interest added. [Connecticut Ins. Co. v. Commonwealth, *supra*; Mutual Reserve Life Ins. Co. v. Roth, *supra*; State v. Vandiver, *supra*.]

Before inquiring what was collected upon this policy, we will distinguish between "net premiums" and "gross premiums". According to plaintiff's actuary, net premium is the amount required to be paid by the insured to meet the tabular cost and is figured to be the exact amount required to carry the insurance from period to period. Gross premium is the amount actually charged by the insurer under the contract, and usually exceeds the net premium by the addition of a certain "loading" for the profit and expenses of the company, such as agents commissions, rent, taxes, etc.

Actuarially, the net premium only should be considered in computing net value. But it has been held, and we think rightly, that all the money received by the insurance company as gross premiums under a policy must be applied toward the payment of the net level premium, that is, toward the payment of the tabular costs and the creation of the reserve which the form or class of the policy makes proper, before any part can be appropriated by the insurance company for profit or expense. [Moore v. Insurance Co., 112 Mo. App. 696, 87 S. W. 988.]

It is manifest, however, that if in the case at bar the entire amount received by the insurance company as gross premiums on account of the policy in suit is thus applied and still the reserve or net value created is insufficient to carry the policy from the lapse to the death of the insured, then the plaintiff cannot recover.

Now, Mitchell the actuary, who was plaintiff's only witness as to value, testified that the tabular costs of the \$2000 insurance in suit for the five years for which pre-

miums were paid aggregated \$118.32. The gross premiums for that period, paid upon the policy, aggregated only \$182.70. This would leave only \$64.38 excess of gross premium over the tabular cost. This excess or surplus roughly augmented by four per cent interest compounded, that is to say, the "net value" of the policy, would have amounted to less than \$73 at the time of the lapse. Three-fourths of this would have amounted to \$54.75, all that could have been applied under the statute to the purchase of temporary insurance, even if gross premiums were treated as net premiums. The court found that the smallest amount necessary as a single premium to purchase temporary insurance of \$2000 from the time of the lapse to the time when Rose died was \$75.90, to meet which there was only \$54.75 available under the statute. It is apparent therefore that three-fourths of the net value of this policy at the time of the lapse was insufficient to keep it alive after the lapse until the death of the insured.

But the plaintiff's witness, Mitchell, testified that "the net value of this policy, five premiums having been paid and lapse occurring, is \$173.56," a sum, we may say, three-fourths of which was more than sufficient to keep the policy alive beyond the time when Rose died. He frankly and voluntarily stated, however, that his answer was based upon the assumption that the Missouri non-forfeiture law, for the purpose of valuing the policy, creates a fixed artificial standard independent of the kind of policy or rate of premium.

On cross-examination, he explained that he assumed that the statute required that the net value be figured upon all policies as though they were "ordinary whole life policies", i. e. policies in which the risk is coincident with life and the premiums are level and fixed and payable at set intervals throughout the continuance of the risk. He conceded that while the policy in suit does not provide for level premiums during the whole of life and therefore was not in fact an "ordinary whole

life policy", he had arrived at the net value given by him only by treating it as an "ordinary whole life policy" and only by assuming, contrary to the fact, that it had level net annual premiums from the date of the policy. He admitted that this method was not the method of figuring net value according to actuarial science, but that he felt compelled to resort to it by his construction of the Missouri non-forfeiture law; that were it not that he so construed the law, he would not answer that the policy had the value he had indicated.

The United States Circuit Court of Appeals, Eighth Circuit, in an ably considered opinion by Judge THAYER, held that the statute would not fairly bear a construction so entirely foreign to its true purpose. [Mutual Reserve Life Ins. Co. v. Roth, 122 Fed. Rep. 853.] We approve of that conclusion.

It follows that the expert testimony of witness Mitchell as to the net value of the policy, being confessedly based upon a false assumption of fact induced by an erroneous construction of the law, is utterly worthless. [Smith v. Telephone, 113 Mo. App. l. c. 443, 87 S. W. 71.]

But plaintiff's counsel has evolved another theory which we will dispose of. Roughly stated it is that inasmuch as a policy of insurance is an executory contract, and the value of the company's promise is fixed, except in so far as it is reduced by the present value of the premiums to be paid upon it by the insured, then the smaller the premiums the greater the value of the policy. In this way he would treat the policy as one would a leasehold estate, where the smaller the rent, the more valuable is the estate.

It is true that a policy issued by a company solvent enough to do business at a loss would be more valuable, in a sense, to the insured, as his burden is made lighter. But it would not have a greater net value within the meaning of our statute, under which, it seems to us, the

tendency is for the premiums and "net value" to diminish together. In return for smaller premiums the insured must increase his vigilance against lapse. The non-forfeiture law did not have in mind rewarding genius in bargain driving. It exhausts itself when it fulfills its fair and equitable purpose of giving the insured all of the insurance his excess of past payments are sufficient to pay for.

Plaintiff's counsel also points to the testimony of one of defendant's witnesses that under ordinary valuation practice, if the gross premium throughout the life of the policy is less than the net premium, then to the regular reserve, computed on the assumption that the gross premium was at least equal to the net premium, must be added something to make up the deficiency. This means nothing more than that under such circumstances the insurer out of its own pocket must make up the deficiency in order to meet its obligation at maturity. To hold that the insured must have a benefit in extended insurance on account of the company's loss in that case would violate the purpose of our statute.

And the same reasoning applies to the departmental practice and statutes intended to secure the solvency of insurance companies, such as section 6925, Revised Statute 1909. It is entirely proper and necessary that, in valuing the policies with a view to ascertaining the insurance company's solvency or its right to do business in this state, the company shall be charged as a liability with the reserve proper to anticipate and meet its policy obligations, and if a policy does not contain provisions for the payment of a sufficient net level premium to create a proper reserve, according to the form of the policy, the company must supply the deficiency out of its available assets, and if they are insufficient for that purpose the company is insolvent and should not be permitted to continue in business. And the company must meet its contract obligation to the policy holder,

although the consideration it exacted for assuming such obligation was insufficient. This is true without regard to our non-forfeiture laws. But it does not follow that section 7897, designed to prevent insurance companies appropriating to their own uses money in equity belonging to the policy-holder, should be so construed as to give the policy-holder extended insurance which was not paid for.

As there was absolutely no evidence in the case tending to show a sufficient net value to keep the policy in suit alive to the time of the insured's death, defendant's demurrer to the evidence at the close of all the evidence should have been sustained. We are also convinced that upon the undisputed facts plaintiff cannot recover upon the policy in suit.

In reaching the above conclusions, we have not taken the pains to determine whether the policy is a "term policy" for the first five years with a privilege of renewal as an "ordinary whole life policy" thereafter, which theory is so earnestly and ably striven for by the appellant's counsel. We have refrained from doing so because we consider it unnecessary in this particular case. We do not wish to be understood as expressing any opinion upon that subject.

The judgment will be reversed. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

PIERCE LOAN COMPANY, Appellant, v. MARY E. KILLIAN, Administratrix of ROBERT LEE KILLIAN, Deceased, Respondent.

St. Louis Court of Appeals, November 29, 1910.

1. **APPELLATE PRACTICE: Conclusiveness of Finding: Uncontroverted Evidence.** In an action at law, even though plaintiff's evidence is not controverted by words, its weight is for the trier of the facts, whose finding is binding upon the appellate court, in the absence of a showing that he acted arbitrarily, under the influence of passion or prejudice.
2. **EVIDENCE: Suit for Goods Purchased: Irrelevant Evidence.** In an action against an administrator for diamonds sold decedent, testimony was admitted on behalf of defendant, upon the promise of his counsel to make its relevancy appear later, that about the time decedent purchased a diamond stud for \$630, charged for in the account sued on, a certain woman had purchased a diamond ring at about the same price, and defendant's counsel was further permitted to ask plaintiff's secretary on cross-examination whether in the probate court he did not identify a receipted bill given to said woman, which showed that a diamond stud had been purchased by her for \$630 and had been paid for by her by eight installments, corresponding in amounts and dates with eight credits shown on decedent's account, and on a denial by said witness of such identification, defendant was permitted to show by another witness that plaintiff's secretary had identified said receipt. *Held*, that said evidence was not relevant.
3. **TRIAL PRACTICE: Evidence: Striking Out Irrelevant Evidence.** Where irrelevant testimony is admitted on the promise of counsel to make its relevancy appear later in the case, and counsel fails to so connect it, it is error to overrule a motion by the adverse party to strike out such irrelevant testimony at the close of the whole case.
4. **APPELLATE PRACTICE: Evidence: Refusing to Strike Out Irrelevant Evidence: Trial Practice.** Where the trial court, sitting as a jury, just before making its finding, overruled a motion to strike out irrelevant testimony, admitted on defendant's promise to make its relevancy appear later in the case, but which promise was not fulfilled, it thereby indicated that such evidence was considered in making its findings, and as such evidence was used to impeach plaintiff's most

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important witness, whose credibility, together with that of the others, was practically the only question in issue, the error in refusing to strike out such irrelevant testimony was reversible.

5. **WITNESSES: Action Against Administrator: Waiver of Incompetency of Survivor.** In an action against an administrator, for goods sold decedent, defendant, by extending the cross-examination of plaintiff's witness beyond the scope of what the witness was competent to testify to on direct examination, waived the witness' incompetency (assuming he was incompetent), so that he became a competent witness for all purposes, and it was error to refuse to permit plaintiff on redirect examination to examine him as to the transactions he had with decedent.

Appeal from St. Louis City Circuit Court.—*Hon. Virgil Rule, Judge.*

REVERSED AND REMANDED.

Kinealy & Kinealy for appellant.

(1) It was the duty of the court to direct a verdict for the plaintiff in this case, as requested. *Corby v. Butler*, 55 Mo. 399; *Kuykendall v. Fisher*, 8 L. R. A. (N. S.) 96; *Bank v. Donald*, 56 Minn. 491; *LaRue v. Lee*, 14 L. R. A. (N. S.) 968; *Davis v. Albritton*, 8 L. R. A. (N. S.) 820; *Cahill v. Railroad*, 205 Mo. 407; *Raney v. Raney*, 128 Mo. App. 167; *Morgan v. Morgan*, 134 Mo. App. 160; *Ulrey v. Ulrey*, 80 Mo. App. 48; *Keinstra v. King*, 122 S. W. 337; *Olcutt v. Century Bldg.*, 214 Mo. 35, 53; *Phelps v. Conq. Zinc Co.*, 218 Mo. 572; *Smith v. Athern*, 34 Cal. 506; *Felton v. LeBreton*, 92 Cal. 457. (2) The court has no discretion to disregard the relevant and competent evidence in a cause—"judicial discretion is a phrase of great latitude, but it never means the arbitrary will of the judge." *Tripp v. Cook*, 26 Wendell (N. Y.) 152; *People v. Sup. Court*, 10 Wendell 291; *Dooley v. Barker*, 2 Mo. App. 327. (3) Respondent having cross-examined witness Geist as to the transactions he had with the deceased, R. Lee Killian, made him a competent witness as to all these

transactions and the court erred in refusing to permit him to testify as to any of them on redirect examination. *Ables v. Ackley*, 126 Mo. App. 87; *Imboden v. Trust Co.*, 111 Mo. App. 232. (4) The court erred in permitting the witness Mr. Oberschelp to testify as to the alleged transactions of plaintiff with Jessie Ross and erred in refusing to strike out that testimony, as it related to a matter not in any way connected with the issues on trial.

Thos. L. Anderson and *Henry Oberschelp* for respondent.

STATEMENT.—This action originated as a claim in the probate court against the estate of defendant's intestate, R. Lee Killian.

The claim was for an alleged balance of \$620.85 upon an open account.

William Geist, secretary of the plaintiff, whose duty it was to sell goods and make loans and keep the books, testified on behalf of plaintiff that he was the agent of the plaintiff in its transactions with Killian, identified the alleged account with Killian and stated that the entries composing said account were made by him at the time the respective transactions represented therein took place. The account was introduced in evidence. It was headed with the name "Lee Killian," and the debit side contained thirty charges under divers dates, from October 9, 1901, to February 16, 1907, and totaling \$2746.35, for diamonds and other jewelry and cash. Said account showed under date of May 27, 1904, a debit for a diamond stud, price \$630. There was no purchase or debit shown by the account from December 24, 1904, until February 16, 1907, and the last item was for cash fifty cents under said last mentioned date.

On the credit side of said account thirty-nine items are shown, totaling in amount \$2125.50. Deducting

the credits from the debits left a debit balance of \$620.85.

Mr. A. C. Stewart, attorney at law, who was formerly president of the Board of Police Commissioners of St. Louis, testified that he was present at the trial of the deceased before the police board, in 1905 or 1906, it appearing that the deceased had been a detective. Remembers that Killian and Geist were there; also that Mr. John J. Kelly, the then stenographer of the board, took a shorthand report of the testimony; that the account book introduced in evidence was then before the board, and Killian examined it and made a statement that he was indebted for some diamonds or jewelry, something of that kind. Does not remember whether Killian mentioned the amount. Remembers Killian examined Geist.

John J. Kelly, the stenographer, testified by referring to his notes that Killian was before the police board on December 29, 1905, as a defendant; that Mr. Geist was present as a witness and Killian cross-examined him; that the questions and answers upon such cross-examination included the following:

"Detective Killian: Q. These diamonds that I purchased from you, I bought these diamonds from you on time payments? A. Yes, sir. Q. I would buy one diamond, and then another, trade one to you for another, and at the end of each month would pay you a small payment, would give you a small amount of money? A. At different times there was different amounts paid. Q. I have made as many payments as from here to Belleville? A. Quite as bad. Q. I owe on your books today seven hundred and fifty dollars? A. Yes, sir. Q. You trusted me with that and I am paying you on time payments? A. Small amounts."

Thomas F. Lynch, who admitted that he had resigned from the police force under charges, after having been on the force fifty-five days, and who stated that he had not taken enough interest in the charges

to even ascertain what they were, testified that while he was in plaintiff's pawnshop about the middle of February, 1907, Killian came in and made a payment of \$49.50, and said to Geist: "that only leaves a little over \$600 now." On cross-examination it was developed that this witness had been a frequenter of plaintiff's pawnshop for about three years. He testified that he could not tell whether he had been in the pawnshop in January. On recross-examination he stated that the statement he attributed to Killian about owing more than \$600 must have been about the 15th or 16th of January.

Mr. John J. Murphy testified that he had seen Mr. Killian in the office of the Pierce Loan Company (time not mentioned) and had seen him exchange a diamond stud for a larger one; had heard no conversation or talking.

On behalf of defendant, Louis E. Killian testified that the deceased was killed around the 11th, somewhere between the 10th and 20th of February, 1907. Says that during the entire month of January, 1907, the deceased was in New Orleans with the Hagenbeck circus.

The foregoing is a substantial statement of all of the evidence in the case. Other facts will be mentioned in the opinion proper as may be necessary to an understanding of the points discussed.

At the close of all the evidence, the plaintiff asked the court to declare that under the law and the evidence its finding must be for the plaintiff for the full amount of its claim. The court refused to give that declaration, but did give the following at plaintiff's request:

"The court declares the law to be that if he believe from the evidence that at the time of the death of Robert Lee Killian he was indebted to the plaintiff on an open account then he shall find for the plaintiff and assess its damages in such amount as he may believe from the evidence to have been the balance due from said Killian to plaintiff together with interest at the

rate of six per centum per annum from the date of the filing of the claim, to-wit."

"The court declares the law to be that any statements made by Robert Lee Killian as to his being indebted to plaintiff, if you believe from the evidence he made any such statements, are admissions against the estate of said Robert Lee Killian in his suit, the same as if said Killian himself was defendant."

Plaintiff asked for no other declarations of law and defendant asked for none. The court made its finding and rendered judgment in favor of defendant, and after an unsuccessful motion for a new trial, plaintiff has duly prosecuted its appeal to this court.

CAULFIELD, J. (after stating the facts).—I. Plaintiff first contends that the evidence was sufficient to make it incumbent upon the trial court to find in its favor, and that we should review the evidence, reverse the judgment and direct a finding and judgment for plaintiff for the full amount of its claim.

We are unable to agree to this contention. Even though the evidence offered upon behalf of the plaintiff was not controverted by words, still its weight, dependent upon the credibility of the witnesses, which might be determined by their manner and demeanor while testifying, was for the trier of the facts, whose finding—this being an action at law and there being nothing to indicate that he acted arbitrarily, under the influence of passion or prejudice—is binding upon us. The evidence may be all one way, yet it is for the trier of the facts to say whether he believes the witnesses or not. [Gannon v. Laclede Gaslight Co., 145 Mo. 502, 515, 46 S. W. 968, 47 S. W. 907; Hunter v. Wethington, 205 Mo. 284, 293, 103 S. W. 543; Connelly v. Railroad, 133 Mo. App. 310, 316, 113 S. W. 233; Dodd v. Guiseff, 100 Mo. App. 311, 315, 73 S. W. 304; Chinn v. Railway, 100 Mo. App. 576, 584, 75 S. W. 375; Hugumin v. Hinds, 97

Mo. App. 346, 352, 71 S. W. 479; City of Poplar Bluff v. Hill, 92 Mo. App. 17, 19.]

This is not a case where it is apparent that there was no serious and real dispute as to the credibility of the witnesses testifying nor as to the existence of the facts to which they gave testimony. It is not a case where the essential facts were conceded. There is not present even the significance that might attach to the defendant not testifying, this action being against the administratrix. Not only by vigorous cross-examination and objecting to questions, but by controverting part of the testimony and even attempting to impeach witness Geist by proof of contrary statements out of court, did defendant's counsel repel any implication that facts or credibility of witness were conceded.

Plaintiff's first contention we rule against it.

II. Upon the promise of defendant's counsel to certainly make its relevancy appear later in the case, the court permitted him to show upon his cross-examination of Geist that about the same time deceased purchased a diamond stud for \$630 charged for in the account, one Jessie Ross had purchased a diamond ring at about the same price, and to ask Geist whether in the probate court he had not identified a receipted bill given to Jessie Ross which showed that a diamond "stud" had been purchased by Jessie Ross for \$630 and had been paid for by her by eight installments, corresponding in amounts and dates with eight credits shown on Killian's account.

Geist denied having so identified such a receipt. Defendant then, still proceeding we assume upon the faith of the promise to show its relevancy, showed by a witness that in the probate court Geist had identified said receipt and that said receipt (which had since been lost or mislaid) did disclose the coincidences of amounts and dates mentioned.

The relevancy of this testimony was not in any

manner made to appear. Nor have we been able to discover it.

The defendant at the close of the whole case moved that all evidence as to this irrelevant transaction be stricken out. The court overruled the motion. This was error. The plaintiff had a right to have said irrelevant evidence stricken out. [Gage v. Averill, 57 Mo. App. 111, 117.]

If the court had admitted the evidence upon the promise to connect it by later evidence and no motion to strike out had been made, then it might have been assumed, as was done in the last cited case, Gage v. Averill, that there was nothing involved but the order of proof as to which the trial court had discretion, and that having no probative force the trial court did not allow this evidence to influence its finding. But here the court, at the close of the evidence, on the very verge of making its finding, overruled the motion to strike out, thereby indicating in a most striking manner that it considered the evidence arrived at as having probative force.

This irrelevant evidence was erroneously used to impeach the credibility of plaintiff's most important witness. [Harper v. Railroad, 47 Mo. 567, 581.] Upon the record before us the credibility of the witnesses was practically the only question for the trial court to determine, and what influenced it in that regard was most important. And we cannot escape the conclusion, based upon its action in overruling plaintiff's motion, that it was influenced in its finding by this incompetent evidence. We therefore hold said action to be reversible error. [McDonald v. Matney, 82 Mo. 358, 366.]

III. We also rule (assuming that Geist was incompetent), that by extending the cross-examination of plaintiff's witness Geist beyond the scope of what the witness was competent to testify to upon direct

examination, as it is apparent from the foregoing she did, defendant waived the witness' incompetency and he became a competent witness for all the purposes of the case, and the court erred in refusing to permit plaintiff upon re-direct examination to examine him as to the transactions he had with the deceased. [Ables v. Ackley, 126 Mo. App. 84, 87, 103 S. W. 974; Imboden v. Trust Co., 111 Mo. App. 230, 232, 86 S. W. 263; McCune v. Goodwillie, 204 Mo. 306, 332, 102 S. W. 997; Borgess Inv. Co. v. Vette, 142 Mo. 560, 571, 44 S. W. 754; Rice v. Waddill, 168 Mo. 99, 120, 67 S. W. 605.]

For the errors above noted the judgment is reversed and cause remanded. *Reynolds, P. J., and Nortoni, J., concur.*

HARRIET KELLEY, Respondent, v. UNITED RAILWAYS COMPANY OF ST. LOUIS, Appellant.

St. Louis Court of Appeals, November 29, 1910.

1. **NEGLIGENCE: Personal Injuries: Falling to Maintain Lights at Excavation: Instruction.** In an action for personal injuries received by falling into an excavation in a street, where a municipal ordinance counted on required not only that red lights should be placed at such excavations but that they should be kept burning during the entire night, an instruction that defendant was not liable if it placed or caused red lights to be placed at and along the excavation on the night of the accident, and before the accident occurred, was erroneous, since the ordinance required not only that red lights should be placed at the point in question but also that they should be kept burning during the entire night.
2. ———: ———: ———: ———. In such a case, an instruction for plaintiff which informed the jury that the ordinance laid a duty on defendant not only to station lights at the excavation, but to keep them burning as well, and that if plaintiff came to her injury, while exercising due care on her part, because of defendant's omission to perform said duty, the finding should be for her, was correct.

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3. **INSTRUCTIONS: Inconsistent Instructions.** Instructions must be in harmony with each other, and if it appear that those given for one side are sound in doctrine and those for the other are in conflict therewith as to grounds of recovery or defense, the verdict must be set aside if it is in favor of the party for whom the erroneous instruction is given, unless on all the proof it appears that the verdict is for the right party.
4. **NEGLIGENCE: Personal Injuries: Failing to Maintain Lights at Excavation: Jury Question.** Whether defendant street railway company was negligent in failing to place sufficient lights to properly guard an excavation in a street, or whether, having placed the lights, it negligently failed to keep the same burning during the entire night, as required by a city ordinance, *held* for the jury.

Appeal from St. Louis City Circuit Court.—*Hon. Matt G. Reynolds*, Judge.

AFFIRMED AND REMANDED.

W. B. Priest and *R. E. Blodgett* for appellant;
Morton Jourdan and *Boyle & Priest* of counsel.

(1) The court's action in sustaining plaintiff's motion for a new trial was erroneous, because defendant's instructions four and five are not in conflict with plaintiff's instruction No. 1 when all are read together. *Squires v. Kansas City*, 100 Mo. App. 628; *Norton v. Cramer*, 180 Mo. 544; *Chambers v. Chester*, 172 Mo. 490; *Batten v. Modern Woodmen*, 131 Mo. App. 381; *Forge Co. v. Engine Co.*, 135 Mo. App. 87. (2) The court's action in granting a new trial was erroneous because the verdict was for the right party and should not have been disturbed. *Bank v. Tuttle*, 127 S. W. 921; 1 *McQuillen Pleading and Practice*, art. 775; *Barry v. Railroad*, 98 Mo. 62; *Fox v. Windes*, 127 Mo. 502; *McKinstry v. St. Louis Transit Co.*, 108 Mo. App. 19.

Frank Landwehr and *Frank H. Haskins* for respondent.

(1) It was the duty of the defendant to place red lights on or near the excavation and to keep such lights burning during the entire night. Sec. 924, Rev. Ord. St. Louis, 1907. (2) An erroneous instruction is not remedied by the giving of a correct instruction which is inconsistent and irreconcilable therewith since it cannot be known whether the jury followed the correct, or incorrect instructions. *Berryman v. Cox*, 73 Mo. App. 73; *Standard Oil Co. v. Meyer Bros.*, 74 Mo. App. 450; *Bluedorn v. Railroad*, 108 Mo. 450; *Stevenson v. Hancock*, 72 Mo. 613; *State v. Herrell*, 97 Mo. 105; *Stone v. Hunt*, 94 Mo. 475. (3) Though the instructions given by the losing side correctly state the law, still if, those given by the prevailing side are contradictory and do not correctly state the law, it is reversible error. *Redpath v. Lawrence*, 42 Mo. App. 112.

NORTONI, J.—This is a suit for damages alleged to have accrued to plaintiff on account of personal injuries received through the negligence of defendant. The finding and judgment were for defendant, but the court sustained a motion for a new trial at the instance of plaintiff, and defendant prosecutes an appeal from that order.

The negligence relied upon in the petition relates to the omission of defendant to maintain certain red lights, during the night of the injury, adjacent to an excavation defendant had made in the public street. It appears plaintiff was a passenger on one of defendant's cars and alighted therefrom at College and Florissant avenues in the city of St. Louis, about ten o'clock at night. The night was dark, both the moon and stars being obscured by clouds, and it is said there was a rain that evening. After having alighted from the car, plaintiff set out to pass to the other side of the street on the crossing, when she fell into an excavation be-

tween defendant's car tracks in the public street. This excavation was made by defendant and was about 200 feet in length. Plaintiff suffered numerous injuries as a result of the fall and instituted this suit on the theory defendant was remiss in its duty in failing to observe the provisions of an ordinance of the city of St. Louis, requiring red lights to be stationed at the excavation and kept burning during the night as signals of danger. Section 924 of the ordinance of the city of St. Louis, in evidence, requires every person making an excavation in any public street to cause one red light to be securely and conspicuously placed on or near such excavation, if the excavation does not extend more than ten feet in length. If the excavation extends over ten feet and less than fifty feet, two red lights, one at each end, shall be so placed, and one additional light for each additional fifty feet or part thereof. The ordinance provides further that such lights shall be kept burning during the entire night.

The evidence given by plaintiff and others for her tended to prove that no red lights were burning at the point of the excavation while several witnesses for defendant testified to the effect that several lights, as many or more than the ordinance required, were stationed along, adjacent, to the excavation at 6:30 o'clock that evening and continued burning all of the time during the entire night.

By an instruction for plaintiff, the court submitted the matter to the jury in accord with the ordinance requirement. The jury were informed that the ordinance laid a duty on defendant to not only station the lights at the excavation but to keep them burning as well and that if plaintiff came to her injury, while exercising due care on her part, because of defendant's omission to perform the duty suggested, the finding should be for her. For defendant, the court gave two instructions, numbered four and five, touching the same matter, as follows:

"If you find and believe from the evidence that the defendant through its servants or employees placed or caused to be placed red lights at and along said excavation where plaintiff fell on the evening of May 4, 1908, and prior to the accident, then the defendant is not liable and your verdict will be for the defendant.

"You are instructed that it was not the duty, and the defendant was not required, to fence the excavation into which the plaintiff slipped or fell, and that the only duty imposed upon the defendant by the ordinance read in evidence was to place red lights at and along said excavation; and if you find and believe from the evidence that the defendant did place or cause to be placed on the evening of May 4, 1908, and before the accident occurred, red lights at and along said excavation where plaintiff fell, then the defendant is not liable."

It is to be noted that instruction numbered four, above copied, proceeds as though defendant had performed the full measure of its duty under the ordinance if it had caused red lights to be placed along the excavation where plaintiff fell on the evening mentioned, and the jury were told upon finding such to be the fact the verdict should be for defendant. It is to be noted also that defendant's instruction numbered five, above copied, pointedly informed the jury that the only duty imposed upon defendant by the ordinance was to place red lights at and along said excavation and that if it found defendant had so done the verdict should be for it. There can be no doubt that both of these instructions were erroneous, for the ordinance required not only that the lights should be placed at the points in question, but that they should be kept burning during the entire night as well. The instruction for plaintiff properly submitted this matter to the jury, but those for defendant directed a verdict for it in event the jury found defendant had performed the first injunction only. The court set aside the verdict for the reason defend-

ant's instructions above copied were not only unsound but in direct conflict with that given for plaintiff touching the same matter. It is argued here the court should not have set the verdict aside because though the instructions given for defendant are subject to the criticism mentioned, they are not irreconcilable with that given for plaintiff. We are not impressed with this argument, for plaintiff's instruction, which covered the whole case, informed the jury that it was defendant's duty to both station the lights and keep them burning. This was an accurate interpretation of the ordinance requirement and an instruction for defendant which directed a finding for it on it appearing the lights were properly stationed alone was directly in conflict and irreconcilable with that given for plaintiff. Under the instruction for plaintiff, which is the law of the case, plaintiff was entitled to recover even though defendant had stationed the lights, as its witnesses said, at 6:30 in the evening if she came to her injury at ten o'clock that night because they were then not burning, for she was entitled to the benefit of the ordinance requiring a signal of danger at all times during the night. Plaintiff's evidence tended to prove there were no lights burning at the time she fell into the excavation and the jury might have so found the fact to be, but nevertheless acquitted defendant of liability under its instructions on the undisputed evidence that the lights were properly stationed along the excavation at 6:30 o'clock in the evening. No more striking case of irreconcilable conflict in instructions may be suggested, and the argument that they may be reconciled on the facts appearing in proof is without merit. The rule requires instructions to be in harmony with each other and if it appears those given for one side are sound in doctrine and those for the other are conflicting therewith as to grounds of recovery or defense, the verdict should be set aside if it is in favor of the party for whom the erroneous instruction is given, unless it be in a case where

on all the proof it appears the verdict is for the right party. [Baker v. K. C., Ft. S. & M. R. Co., 122 Mo. 533, 26 S. W. 20; Stone v. Hunt, 94 Mo. 475, 7 S. W. 431; Bluedorn v. Mo. Pac. Ry. Co., 108 Mo. 439, 18 S. W. 1103; Berryman v. Cox, 73 Mo. App. 67.]

But it is said the verdict was for the right party and the verdict of the jury should be reinstated for this reason. We do not so view the case, for there appears a direct conflict in the evidence as to whether or not the lights were burning at the time plaintiff came to her injury and in those circumstances, the matter is for the jury under proper instructions. The court very properly ordered a new trial. The order granting a new trial will be affirmed and the cause remanded. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

SAMUEL KELLER, Respondent, v. MAYER FERTILIZER COMPANY, Appellant.

St. Louis Court of Appeals, November 29, 1910.

1. **STATUTE OF FRAUDS: Sales: Agreement to Be Performed in One Year.** To remove a contract from the operation of the Statute of Frauds (section 2783, Revised Statutes 1909), it must be one that may be fully performed within a year.
2. ———: ———: ———: **Postponement of Performance: Facts Stated.** The computation of time, in ascertaining whether a contract will be performed in one year, begins from the making of the contract, and not from the date stipulated for performance to begin; and hence a verbal contract entered into November 21, 1907, which provided for the sale and delivery of all of certain material which the seller might accumulate during the year commencing November 22, 1907 and ending November 21, 1908, was a contract not to be performed within a year and was within the Statute of Frauds (section 2783, Revised Statutes 1909).
3. ———: ———: ———: ———: **Possibility of Performance Within Year.** A verbal contract which requires certain conduct with respect to the subject-matter for a period beyond a

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year is within the Statute of Frauds, although there may be a possibility of full performance of the contract within a year.

4. ———: ———: ———: **Contract Defeated Within Year.** A verbal contract expressly providing that it shall not be performed within a year is within the Statute of Frauds, notwithstanding it may be defeated by the happening of a contingency within a year, for, in such case, the parties having agreed that performance shall be postponed beyond a year, no contingency happening within a year can amount to performance according to the intention so expressed.
5. ———: ———: ———: **Purely Personal Contract: Indefinite Duration.** Where a verbal contract is purely personal, so that it imposes no obligation upon the personal representatives, and is furthermore indefinite in point of time, the authorities declare it is not within the Statute of Frauds, for the reason the death of the parties, which may occur within a year, operates its full performance.
6. ———: ———: ———: ———: **Definite Duration.** A verbal contract which is purely personal and imposes no obligation upon the personal representatives but which expressly creates an obligation for a definite time of more than one year is within the Statute of Frauds.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm*, Judge.

AFFIRMED.

Louis Mayer and *S. C. Rogers* for appellant

The court erred in ruling that the contract alleged by appellant to have been entered into was within the purview of the Statute of Frauds, and not being in writing could not be enforced. *Jordan v. Railroad*, 92 Mo. App. 84; R. S. 1899, sec. 4160; R. S. 1899, sec. 3418; *Wynn v. Followill*, 98 Mo. App. 465; *Suggett's Admx. v. Cason's Admr.*, 26 Mo. 225; *Foster v. O'Brien*, 18 Mo. 91; *Harrington v. Railroad*, 60 Mo. App. 230; *Biest v. Shoe Co.*, 97 Mo. App. 149; *Railway v. Wood*, 88 Tex. 191; *Seddon v. Rosenbaum*, 85 Va. 928; *Roberts v. Rockbottom (Mass.)*, 7 Metc. 46; *Roberts v. Summit Park Co.*, 72 Hun. 458, 25 N. Y. Supp. 297; *Dickson v. Frisbee*, 52 Ala. 165.

M. T. Farrow for respondent.

(1) The alleged agreement being within, and not executed with the formalities prescribed by, the Statute of Frauds, was not and could not be rendered enforceable by contract, oral admissions, or a re-statement of the terms thereof, after the date of the alleged making thereof. *Blanton v. Knox*, 3 Mo. 343; *Sharp v. Rhiel*, 55 Mo. 97; *Berrien v. Southack*, 7 N. Y. Supp. 324; *Snelling v. Lord Huntingfield*, 1 Crompt. M. & R. 20; *Chase v. Hinckley*, 105 N. W. 231; *Odell v. Webendorfer*, 64 N. Y. Supp. 451; *Haslam v. Barge*, 96 N. W. 245; *Goldberg v. Cohen*, 110 N. Y. S. 185; *Davis v. Life Ins. Co.*, 86 N. W. 1021; *Comes v. Lamson*, 16 Conn. 246; *Spencer v. Halstead*, 1 Denio 606; *Turnow v. Hochstadter*, 7 Hun 80. (2) An oral agreement to put into writing a contract that will require more than a year for performance is within the statute, and no action will lie for its non-performance. *Browne*, Stat. Frauds (4 Ed.), 341, par. 284, and cases cited; *Amburger v. Marvin*, 4 E. D. Smith (N. Y.) 393; *McLachlin v. Whitehall*, 99 N. Y. S. 721; *Harrell v. Sonnabend*, 191 Mass. 310; *Dovenmuehle v. Ellenberger*, 70 Ill. App. 180; *McKinley v. Lloyd*, 128 Fed. 519.

NORTONI, J.—This is a suit on an account, which is conceded to be correct; but defendant's answer contained a counterclaim for damages alleged to have accrued to it through the breach of a contract to deliver other goods or material. The Statute of Frauds was interposed against the right of recovery on the contract declared upon in the counterclaim, and at the conclusion of all the evidence, the court peremptorily directed a verdict against defendant, both on the account and the counterclaim. From this ruling defendant prosecutes the appeal.

Defendant is an incorporated company engaged in the rendering business and as such is a purchaser of

fat, refuse and offal matter. It appears plaintiff is engaged in the business of accumulating such fat, refuse and offal matter from the butchers and selling it to those who render it into tallow, lard, etc. Plaintiff delivered a considerable quantity of such matter to defendant under a verbal contract with it, and this suit seeks a recovery therefor, on account of such deliveries. Defendant concedes having received fats, etc., mentioned and that the amount sued for on account is correct, but says it received the fat, refuse, etc., under a contract with plaintiff, whereby plaintiff agreed to deliver all of such material which he might accumulate or have during the year commencing November 22, 1907, and ending with November 21, 1908. It is averred that plaintiff breached the contract by his refusal to perform the same in accordance with its terms and occasioned a considerable loss to defendant for which loss a recovery of damages is sought against him. Though a contract was drawn up, it is conceded in the case that it was never signed by plaintiff and the evidence is conclusive to the effect that the agreement was verbal only. Defendant's principal officer and agent, with whom all of the negotiations were had, testified, and the case concedes, that the verbal contract relied upon as the basis of the counterclaim was entered into between the two parties not later than November 21, 1907, to take effect on the following day, November 22. It appears the parties negotiated several days before November 21 and finally entered into the verbal contract whereby plaintiff was to deliver the material to defendant for the period of one year, from November 22, 1907, until November 21, 1908, at certain stipulated prices and on terms of settlement unnecessary to set forth.

It is argued for defendant the court erred in directing a verdict against it on this uncontroverted proof, for the reason, though the contract was verbal and entered into November 21, 1907, it was not to take effect until the following day, November 22, and a computa-

tion from that day until November 21, 1908 removed the matter from the operation of the Statute of Frauds, as it could be fully performed within one year. Our Statute of Frauds (sec. 2783, R. S. 1909, sec. 3418, An. St., 1906) provides that no action shall be brought to charge any person upon an agreement that is not to be performed within one year from the making thereof unless the agreement upon which the action shall be brought or some memorandum or note thereof shall be in writing and signed by the party to be charged therewith, or by some other person by him thereto lawfully authorized.

Ordinarily, to remove a contract, such as this one, from the operation of the clause of the statute referred to, it must be one that may be fully performed within one year. The performance required by the statute is full performance. The contract in such circumstances must be capable of entire and complete execution within the year. [Sharp v. Rhiel, 55 Mo. 97; Browne on Statute of Frauds (5 Ed.), sec. 285.] This being true, the term or time of the contract is to be computed from the day it is made and not from a future date which may be stipulated therein as the time performance shall commence. As it is conceded the verbal contract was entered into November 21st, stipulating performance to commence November 22, 1907, and to continue for the period of a year until November 21, 1908, the court properly declared the law on this feature of the case to the effect no action could be maintained thereon. Such a contract is for a year and one day beyond question. This is true notwithstanding the stipulation that performance should commence on November 22d, for the statute operates on the contract from the time it was entered into and not from a future date, though such may be agreed upon. [Biest v. Versteeg Shoe Co., 97 Mo. App. 137, 149, 70 S. W. 1081; Sharp v. Rhiel, 55 Mo. 97.] Indeed the statute in plain terms, when invoked, inhib-

its a recovery on contracts not to be performed within one year from the *making thereof*.

In construing the clause of the Statute of Frauds now under consideration, the courts have drawn nice distinctions with respect to contracts which fall within and without its influence. Some of the cases would seem to entirely overlook the highly remedial purpose of the statute. There is abundant authority to the effect that some parol contracts, although expressly allowing more than a year for performance, are without the statute if the agreement may be substantially and reasonably performed according to the understanding and intention of the parties within a year. [Browne on Statute of Frauds (5 Ed.), sec. 278.] It is argued the contract before us should be deemed to be such, for the reason that though it stipulated more than a year for performance, it was possible for plaintiff to fully perform his undertaking within less than a year from the date it was made. The undertaking of plaintiff was to deliver to defendant, at certain prices, all of the fat and refuse which he might accumulate or have until November 21, 1908. It is said as plaintiff might not accumulate or have refuse matter during the latter part of this period, the contract was susceptible of full performance within less than a year and for this reason should be declared one falling without the influence of the statute. The contract, of course, imposed reciprocal obligations and while it was for plaintiff to deliver the material to defendant if he accumulated or had it during the entire period, it required defendant to accept such deliveries at the prices and on the terms named to and including the last day of the time stipulated. The parties are free to contract, and the rule is, that though there be a possibility of full performance in less than a year, nevertheless, if it *requires* certain conduct with respect to the subject-matter for a period beyond a year, however short, the statute finds application. Where the manifest intent of the parties, as gathered from the

words used and the circumstances existing at the time, is that the contract shall not be executed within a year, the mere fact that it is possible the thing may be done within the year will not prevent the statute from applying, says Mr. Browne on the statute (5 Ed.), section 281. [See, also, secs. 279, 280, 281.] Indeed, the rule is well nigh universal to the effect that where the contract in terms calls for the doing of a thing during or after a definite period of more than one year from the making of the agreement the statute obtains. [Browne on the Statute of Frauds (5 Ed.), sec. 282.] In accord with this rule, the Supreme Court of the United States declared in *Washington, etc., Steam Packet Co. v. Sickles* (5 Wall. U. S. 580), 72 U. S. 580, that though a contract might possibly have been fully performed or terminated within a year by the loss or destruction of a certain boat, it nevertheless was within the Statute of Frauds, notwithstanding the possibility suggested, for it obviously stipulated a period of time beyond the year, which conclusively evinced such to have been within the contemplation of the parties.

This court, in *Biest v. Versteeg Shoe Co.*, 97 Mo. App. 137, 70 S. W. 1081, declared a contract of employment of more than one year to be within the statute notwithstanding one or both of the parties had the express option of terminating the same by notice to the other before the year elapsed and thus operating its full performance. [See, also, to the same effect *Meyer v. Roberts*, 46 Ark. 80; *Wilson v. Ray*, 13 Ind. 1. And touching the same principle, see *McKeaney v. Black*, 117 Cal. 587.] According to principle and by the weight of both authority and reason, a contract expressly providing for performance to a definite time beyond a year from the making thereof is within the statute, notwithstanding it may be defeated by the happening of a contingency, for in such case, the parties having expressed that the performance shall be postponed beyond a year, it is clear that no contingency happening within a year can amount

to performance in accord with the intention so expressed. [29 Am. and Eng. Ency. Law (2 Ed.), 945.] Though it were possible for plaintiff to perform the undertaking in less than a year from its date because of his inability to accumulate or have the material for delivery, the contract was nevertheless one within the Statute of Frauds for the reason that it purported an obligation which required defendant to accept a delivery made on the very last day and required plaintiff as well to make the delivery if he either accumulated or had any of the material referred to.

It is next argued that as the contract is personal in so far as plaintiff is concerned and does not require performance by his representatives after death, it is without the statute for the reason it might have been fully performed by the death of the plaintiff within the year. When a contract is purely personal, so that it imposes no obligation upon the representatives, and is furthermore indefinite in point of time, the authorities declare it is not within the statute, for the reason the death of the parties, which may occur within the year, operates its full performance. [See Browne on the Statute of Frauds (5 Ed.), sec. 277; *Foster v. McO'Brien*, 18 Mo. 88.] But the rule of decision referred to is without influence in those cases where the contract expressly creates an obligation for a definite time of more than one year, such as this one. In such circumstances, it is immaterial that the death of the party which may occur within the year operates performance of the contract in view of its personal nature entailing no obligation upon the representatives, for it must be understood that all persons contemplate a human life may terminate at any time and therefore, as the parties, with this in mind, have expressly postponed the full performance of the contract to a time beyond a year from its date, the statute obtains, if invoked at the trial. [See Browne on the Statute of Frauds (5 Ed.), sec. 282a; *Biest v. Versteeg Shoe Co.*, 97 Mo. App. 137, 153,

154, 70 S. W. 1081; 29 Am. and Eng. Ency. Law (2 Ed.) 945.]

The parties, who were free to contract, having by express words voluntarily postponed the performance for more than one year, the contract falls within the operation of the statute, notwithstanding the contingency of the death of either before the expiration of a year, for such was essentially within their contemplation at the time. We believe the statute should be upheld and given effect as was done by the trial court rather than frittered away. The court very properly directed a verdict on the grounds of the statute, and the judgment should be affirmed. It is so ordered. *Reynolds, P. J., and Caulfield, J., concur.*

UNITED RAILWAYS COMPANY OF ST. LOUIS,
Appellant, v. JOHN J. O'CONNOR et al., Respondents.

St. Louis Court of Appeals, November 29, 1910.

1. **BILL OF INTERPLEADER: Grounds.** The essential purpose of a bill of interpleader is to protect the indifferent holder of a fund or the bailee of an article from the annoyance and expense of separate actions to recover what he is willing to pay; and the bill lies when the same fund, debt, or thing is claimed by hostile parties through adverse titles derived from a common source, provided the interpleader is a mere stakeholder, with no interest in the subject-matter, and has not incurred any liability to either of the claimants personally.
2. ———: ———: **Exclusive Right to Fund in One Defendant.** Where it appears from a bill of interpleader that one defendant has a valid right to the fund and it appears affirmatively that the other defendant is without any right thereto, no ground for the bill exists.
3. **ATTORNEY AND CLIENT: Attorney's Lien: Settlement of Case: Statute.** Under section 965, Revised Statutes 1909, where a settlement of a cause of action is effected with the client,

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without the written consent of the attorney, after notice of the attorney's contract and lien, a cause of action arises in favor of the attorney, which may be enforced against the party settling by a suit at law for the percentage of the settlement stipulated for in the contract of employment.

4. ———: ———: ———: ———: **Right of Client to Settle.** Notwithstanding the attorney's lien statute, the client may settle his case, for, in the interest of the peace and repose of society, the law encourages the compromise of litigation.
5. ———: ———: ———: ———. Under sections 964 and 965, Revised Statutes 1909, where a plaintiff made a settlement without the consent of his attorney, who had given the required notice, and agreed to pay his attorney out of the money received, the settlement liquidated the cause of action and fixed the attorney's right of recovery against defendant in the action at the percentage stipulated in the contract of employment.
6. ———: ———: **Discharge of Attorney: Rights of Client.** Notwithstanding the attorney's lien statute, a client may, for sufficient cause, discharge his attorney, and it may be, under proper circumstances, the lien of a recreant so discharged would be forfeited.
7. **PLEADING: Demurrer to Petition: Allegations to Be Taken as True.** The court, on demurrer to a bill of interpleader, must take the averments thereof as importing verity.
8. **ATTORNEY AND CLIENT: Attorney's Lien: Discharge of Attorney: Employment of Other Attorneys: Interpleader's Bill: Sufficiency.** A bill of interpleader by one against whom a suit had been instituted and who had settled the case with the plaintiff, without the consent of the attorney who tried the suit, to determine its liability as to said attorney and other attorneys who claimed to have a lien on the plaintiff's cause of action, alleged that an attorney instituted a suit for the plaintiff for damages; that he and his client had entered into a contract fixing his compensation at one-half of the amount of the recovery; that he had served the defendant with notice of his attorney's lien, as required by section 965, Revised Statutes 1909; that the client attempted to discharge him, but did not allege that she actually did discharge him; that the client entered into an agreement with other attorneys whereby she agreed to pay them one-half of the amount recovered by her, and that said attorneys claim a lien on the fund arising from the settlement of the case made by the client with the defendant, but did not allege that such attorneys were employed for the purpose of performing any services with respect to the cause of action on which the first attorney had insti-

tuted suit; that the client settled the case with defendant, and that the attorney first employed and those subsequently employed assert and claim a lien on the proceeds arising out of said settlement, and that said claims are identical and for the same sum and are not independent. *Held*, that defendant could not maintain a bill of interpleader to determine its liability to the several attorneys, because, under the facts stated, it was liable to the attorney who instituted the suit, since the bill alleged only an attempt on the part of the client to discharge him, and not that he was actually discharged for good cause, and since the bill did not contain pointed allegations that the other attorneys performed services for the client under an agreement with her for compensation touching the identical cause of action on which the first attorney had instituted suit.

9. ———: ———: ———: **Effect of Employing Other Attorneys.** Under the attorney's lien statute, where a client enters into a contract with an attorney for a percentage of the amount recovered, such contract, by operation of law, amounts to an assignment to the attorney of the amount stipulated for therein, and the client can confer no rights on others touching the same, unless it would be in the case where such attorney was discharged for good cause and a new employment of other attorneys was made about the same subject-matter.
10. **PLEADING: Demurrer to Petition: Inferences.** Inferences are not indulged in aid of a petition challenged by demurrer as they are after judgment when no demurrer has been interposed.
11. **BILL OF INTERPLEADER: Requisites.** A bill of interpleader should show not only the willingness of plaintiff as stakeholder to render the debt or duty to the rightful claimant, but it should show that he is ignorant or in doubt which is the rightful claimant, and that he is in danger, by reason of such doubt, from their conflicting demands, and where it shows on its face that one of the claimants is certainly entitled to the fund as against the other claimant, it is insufficient on demurrer.

Appeal from St. Louis City Circuit Court.—*Hon. Moses N. Sale*, Judge.

AFFIRMED.

Boyle & Priest for appellant.

(1) The plaintiff's bill of interpleader should be sustained upon purely equitable grounds, in order to

relieve the plaintiff of the necessity of contesting two separate and distinct law suits, the issue in both of which would be the same.

John J. O'Connor pro se.

(1) The conditions necessary to justify a resort to a bill of interpleader are, The same debt fund or thing must be claimed by hostile parties under adverse titles derived from a common source; the interpleader must be a mere stakeholder with no interest in the subject-matter; he must have incurred no liability to either of the claimants personally; He must stand exposed to the risk of being vexed by two or more persons for the fund or subject-matter in dispute; and, he must not have assumed inconsistent obligations to the different claimants. If either of these conditions are lacking the bill will not lie. Sup. Council L. of H. v. Plumber, 107 Mo. App. 163; 3 Pomeroy Eq. Jur. (2 Ed.), sec. 1319; 2 Story's Eq. Jur., chap. 20. (2) Where one is indebted to one of two persons, but does not know which of them the law requires him to pay, he may secure the advice of a lawyer to aid him in determining which of the two he should pay. But he has no right to ask a court of equity to act as his attorney, and that too, at the cost of his creditors. In such a case the debtor in making the payment must "protect himself as best he can," for a court of equity will not, in such a case, perform the functions of a legal adviser. Hartsook & Home v. Chrissman, 114 Mo. App. 561; Sullivan v. K. of F. M., 73 Mo. App. 45; Kersey v. O'Day, 173 Mo. 560; Funk v. Avery, 84 Mo. App. 494.

STATEMENT.—The court declared the petition for defendants to interplead insufficient on the demurrer of defendant John J. O'Connor, and plaintiff prosecutes an appeal from that judgment. Omitting formal matter and signatures, the petition is as follows:

"Comes now the plaintiff in the above entitled cause and states that it is a corporation duly organized and existing under and by virtue of the laws of the State of Missouri; that defendants, John E. Bishop and Thomas A. Cobbs, are co-partners doing business under the firm name and style of Bishop and Cobbs; that all of the defendants above named are duly licensed and practicing attorneys in the city of St. Louis and State of Missouri.

Plaintiff states that one Mary Harrigan instituted a suit against this plaintiff in the circuit court of the city of St. Louis, Missouri, on account of certain alleged injuries which she claimed to have sustained through the alleged negligence of this plaintiff, and that said suit was numbered 44,406, and was assigned to Division No. 3 of said circuit court of the city of St. Louis; that said Mary Harrigan employed the defendant John J. O'Connor to institute said suit for her and that said O'Connor drew the petition in said suit and instituted the same in this court, attended the taking of depositions therein and performed various other services. That in consideration of O'Connor's services said Mary Harrigan agreed to pay him fifty per cent of the amount she recovered from this plaintiff.

Plaintiff further states that said O'Connor served it with a notice of his attorney's lien in accordance with the contract theretofore entered into between said O'Connor and said Mary Harrigan.

Plaintiff further states that thereafter said Mary Harrigan attempted to discharge said O'Connor, but said O'Connor notified this plaintiff that the services he rendered said Mary Harrigan had not been paid for and that he still retained his lien on the alleged cause of action of said Mary Harrigan.

Plaintiff further states, upon information and belief, that said Mary Harrigan also entered into an agreement with the defendants Albert E. Hausmann, John E. Bishop and Thomas A. Cobbs, whereby said Mary Harrigan agreed to pay said Bishop and Cobbs and Haus-

mann fifty per cent of the amount recovered by her, and that said Bishop & Cobbs and Hausmann claim a lien on the alleged cause of action of said Mary Harrigan.

Plaintiff further states that said Mary Harrigan afterwards fully and forever released, acquitted and discharged this plaintiff on account of the alleged matters and things set forth in her petition in said cause, in consideration of which plaintiff paid her the sum of five hundred dollars.

Plaintiff further states that the defendants John E. Bishop, Thomas A. Cobbs and Albert E. Hausmann have rendered certain legal services to the said Mary Harrigan, but the exact nature of which plaintiff does not know.

Plaintiff further states that said John J. O'Connor and the said Thomas A. Cobbs and John E. Bishop and Albert E. Hausmann have each and all been asserting and claiming a lien on the proceeds arising out of the settlement of the alleged cause of action of said Mary Harrigan, which said claims of John E. Bishop, Thomas A. Cobbs and Albert E. Hausmann are conflicting with the said claim of John J. O'Connor, and that it cannot, without hazard, determine to which of the claimants it should pay the fund.

Plaintiff further states that it has no interest whatever in the claims of said Bishop & Cobbs and Hausmann and said John J. O'Connor, and is ready and willing at all times to pay a sum equal to fifty per cent of said sum of five hundred dollars, which was paid to the said Mary Harrigan in settlement of her claim, to-wit, the sum of two hundred and fifty dollars into this court and be released from the claims of said Bishop & Cobbs and Hausmann and the said John J. O'Connor.

Plaintiff further states that the claims of said Bishop & Cobbs and Hausmann, and said John J. O'Connor, are identical and are for the same fund, and are not independent.

Plaintiff further states that it is not making any claim to the sum to which said lien attaches and that it is not acting in collusion with or favoring said Bishop & Cobbs and Hausmann or the said John J. O'Connor, or either or any of them.

Plaintiff further states that it is unacquainted with the actual facts involved in the said controversy between said Bishop & Cobbs and Hausmann and said John J. O'Connor and that it is being sued by each and all of them; that said Bishop & Cobbs and Hausmann have instituted a suit against this plaintiff on account of the matters and things hereinbefore set out, which suit is now pending in Division No. 1 of the circuit court of the city of St. Louis, Missouri.

Plaintiff further states that the said defendant, John J. O'Connor, has instituted a suit against this plaintiff on account of the matters and things hereinbefore set out, which suit is now pending before George P. Reichmann, justice of the peace within and for the Seventh District of the city of St. Louis, Missouri, which court is inferior to the jurisdiction of this court. That neither of said suits have been reduced to a judgment.

Plaintiff further states that it has not incurred any independent liability to any of the defendants herein, on account of the matters and things herein set out.

Plaintiff further states that it has heretofore employed counsel to make investigation of the matters and things hereinbefore recited with a view to determining, if possible, the respective rights of the parties, in order that a proper payment and disposition of the sum might be made and that both plaintiff and its legal counsel have been for some time engaged in said investigation.

Plaintiff further states that in effecting a compromise of her alleged cause of action with said Mary Harrigan, she agreed to pay her lawyers their fees and this plaintiff made no agreement to pay said lawyers.

Plaintiff further states that said Mary Harrigan is insolvent and has failed and refused to pay the said

Bishop & Cobbs and Hausmann and the said John J. O'Connor their fees and that this plaintiff recognizes its statutory liability for the same in a sum equal to fifty per cent of said five hundred dollars.

Plaintiff further states that it has no complete or adequate remedy at law, and that if both said suits of Bishop & Cobbs and Hausmann, and John J. O'Connor, are prosecuted, plaintiff will be subjected to two vexatious suits arising out of the same cause of action or demand.

Wherefore, plaintiff prays for leave to pay into court the sum of two hundred and fifty dollars and that the said Bishop & Cobbs and Hausmann and the said John J. O'Connor be ordered to interplead for the same and that plaintiff be released from all claims on the part of said Bishop & Cobbs and Hausmann and the said John J. O'Connor, or either of them, against this plaintiff on account of their said liens; that plaintiff be allowed out of said sum a reasonable attorney's fee for the investigation of the matters hereinbefore recited and for the preparation and filing of this bill of interpleader.

Plaintiff further prays that the said Albert E. Hausmann and Bishop & Cobbs be enjoined and restrained from prosecuting said suit in the circuit court of the city of St. Louis, Missouri, and that the defendant John J. O'Connor be enjoined and restrained from prosecuting said suit before George P. Reichmann, justice of the peace aforesaid, and plaintiff prays for its costs and for such other and further relief as to the court may seem meet and proper."

NORTONI, J. (after stating the facts).—The essential purpose of a bill of interpleader is to protect an indifferent holder of a fund or bailee of an article from the annoyance and expense of separate actions to recover what he is willing to pay. Under the equitable principles which obtain, such a bill will lie when the same debt, fund or thing is claimed by hostile parties through adverse titles derived from a common source.

But the interpleader must be a mere stakeholder with no interest in the subject-matter and it must appear he has incurred no liability to either of the claimants personally. In such circumstances the remedy is available to one who stands exposed to the risk of being vexed by two or more suits for the fund or other subject-matter in dispute. It is not necessary, however, that the stakeholder shall be liable to two judgments, for he cannot be so liable unless he has assumed inconsistent obligations and, in that event, a bill of interpleader will not lie. [4 Pomeroy's Eq. Jur. (3 Ed.), secs. 1319, 1320, 1321, 1322, 1323, 1324, 1325, 1326, 1327; Supreme Council of Legion of Honor v. Palmer, 107 Mo. App. 157, 194, 80 S. W. 699.] In view of these principles, it is argued for plaintiff that the court erred in sustaining defendant O'Connor's demurrer for the reason the bill discloses plaintiff to be a disinterested holder of the fund, \$250, which it is anxious and willing to pay over to the rightful claimant and that it has placed itself under no liability to respond independently to either one of the defendants. It is said, too, that it recognizes its liability to some one and the only question about which a controversy is to be had pertains to the rights of O'Connor, on the one part, and Bishop & Cobbs and Hausmann on the other, with respect to which question plaintiff is entirely neutral and unconcerned. The argument suggested entirely overlooks the fact that plaintiff may have assumed an obligation to one of the defendants by conduct, though no express promise was made, and that the right of such defendant as a result of this obligation may appear to the exclusion of the other beyond doubt. In other words, the argument overlooks the fact that it may appear one defendant has a valid right to the fund and affirmatively appear as well that the other is without any right touching the matter whatever. In such circumstances, no grounds for the bill exist as the matter of right presents no question of doubt sufficient to invoke the aid of a court of equity. [Woodmen of the

World v. Wood, 100 Mo. App. 655, 75 S. W. 377; 4 Pomeroy's Eq. Jur. (3 Ed.), sec. 1328; Shaw v. Coster, 8 Paige (N. Y.) 339-347, 348; Story's Eq. Jur., sec. 821; Beach's Mod. Eq., sec. 148; Parker v. Barker, 42 N. H. 78, 93; 23 Cyc. 25, 26; 11 Ency. Pl. and Pr. 461, 468; Bassett v. Leslie, 123 N. Y. 396; Crass v. Memphis, etc., R. R. Co., 96 Ala. 447, 11 So. 480; Starling v. Brown, 7 Bush. (Ky.) 164.]

To a complete understanding of the whole matter, it will be necessary to refer to our statutes giving attorneys a lien on the claim or cause of action of their client for compensation, as plaintiff's petition for an interpleading must be interpreted under the influence of those statutes and the adjudications which they have entailed. The statutes referred to are as follows:

"The compensation of an attorney or counsellor for his services is governed by agreement, express or implied, which is not restrained by law. From the commencement of an action or the services of an answer containing a counterclaim, the attorney who appears for a party has a lien upon his client's cause of action or counterclaim, which attaches to a verdict, report, decision or judgment in his client's favor, and the proceeds thereof in whosoever hands they may come; and cannot be affected by any settlement between the parties before or after judgment." Sec. 964, R. S. 1909.

"In all suits in equity and in all actions or proposed actions at law, whether arising *ex contractu* or *ex delicto*, it shall be lawful for an attorney at law either before suit or action is brought, or after suit or action is brought, to contract with his client for legal services rendered or to be rendered him for a certain portion or percentage of the proceeds of any settlement of his client's claim or cause of action, either before the institution of suit or action, or at any stage after the institution of suit or action, and upon notice in writing by the attorney who has made such agreement with his client, served upon the defendant or de-

fendants, or proposed defendant or defendants, that he has such an agreement with his client, stating therein the interest he has in such claim or cause of action, then said agreement shall operate from the date of the service of said notice as a lien upon the claim or cause of action, and upon the proceeds of any settlement thereof for such attorney's portion or percentage thereof, which the client may have against the defendant or defendants, or proposed defendant or defendants, and cannot be affected by any settlement between the parties either before suit or action is brought, or before or after judgment therein, and any defendant or defendants, or proposed defendant or defendants, who shall, after notice served as herein provided, in any manner, settle any claim, suit, cause of action, or action at law with such attorney's client, before or after litigation instituted thereon, without first procuring the written consent of such attorney, shall be liable to such attorney for such attorney's lien as aforesaid upon the proceeds of such settlement, as per the contract existing as hereinabove provided between such attorney and his client." [Sec. 965, R. S. 1909.]

Plaintiff owns and operates a street railway system in the city of St. Louis and it appears from the allegations of the bill of interpleader that Mrs. Harrigan received an injury through its alleged negligence. Because of this injury, a claim or cause of action accrued in her favor and she employed defendant John J. O'Connor as her counsel to prosecute the same against the railways company. In employing the counsel, Mrs. Harrigan contracted in writing to pay him fifty per cent of whatever amount might be obtained on her claim or cause of action by either suit or compromise and of this contract defendant O'Connor notified plaintiff, to the end of affixing his right for compensation from it though the claim or cause of action might eventually be settled with Mrs. Harrigan without his written consent. It appears, too, from the bill that defendant

John J. O'Connor, in compliance with his contract to that effect, instituted a suit against plaintiff on the claim or cause of action referred to and that this suit was subsequently settled by plaintiff with Mrs. Harrigan by paying to her five hundred dollars without first having obtained the consent of defendant O'Connor. But it is averred in the bill Mrs. Harrigan agreed to pay the fees of her counsel. The statute substantially provides that if a settlement be made with the attorney's client, after notice of his contract and lien, as in the circumstances of this case, the right of the attorney to enforce his lien for the amount agreed upon shall not be affected thereby. It is the rule of decision under the second section of the statute quoted (sec. 965) that by effecting a settlement with the client, after notice of the lien, without the written consent of the attorney, a party operates a cause of action to arise in favor of the attorney which may be enforced against him by a suit at law for the percentage of the settlement stipulated for in the contract of employment. [Yonge v. St. Louis Transit Co., 109 Mo. App. 235, 84 S. W. 184; O'Connor v. St. Louis Transit Co., 198 Mo. 622, 97 S. W. 150; Taylor v. St. Louis Transit Co., 198 Mo. 715, 97 S. W. 155.]

The allegations of the bill of interpleader reckoned, in a measure, with the statutes above quoted, for they proceed to aver and concede a liability to some one in the amount of \$250, which is fifty per cent of \$500, the amount for which the claim or cause of action of Mrs. Harrigan is said to have been settled. Notwithstanding the attorney's lien statutes, plaintiff was free to settle her case against the street railroad company; for in the interest of the peace and repose of society the law encourages the compromise and adjustment of litigation. But though she was free to settle the controversy with the present plaintiff without the written consent of her counsel, the rights of O'Connor, the attorney, were not disturbed by the settlement. Accepting the averments of the bill as importing verity, as we must on demurrer,

it appears Mrs. Harrigan agreed in the settlement to pay her counsel out of the five hundred dollars she received. This being true, the settlement liquidated the entire cause of action and fixed O'Connor's right of recovery against the present plaintiff at the amount of \$250 or fifty per cent of that paid by Mrs. Harrigan for her and her counsel as well. [Curtis v. Metropolitan Street Ry. Co., 118 Mo. App. 341, 354, 94 S. W. 762; s. c., 125 Mo. App. 369, 102 S. W. 62.]

From the averments in the bill, when considered under the influence of the statutes and decisions referred to, it is obvious that it discloses on its face a valid and enforceable obligation in favor of defendant O'Connor against plaintiff to the amount of \$250, unless other averments therein show his right to have been divested or otherwise destroyed. In other words, it appearing that O'Connor actually instituted the suit for his client under contract for fifty per cent, served notice on plaintiff to that effect, and that it afterwards settled the cause of action with Mrs. Harrigan without his written consent, its conduct raised an obligation under the law on its part to pay O'Connor fifty per cent of the amount, or \$250. On the face of the bill, this obligation is to be declared as a liability of plaintiff to defendant O'Connor, unless other averments show him to have had no right in the premises at the time the settlement was made. It is averred in the bill that Mrs. Harrigan attempted to discharge her attorney, O'Connor, before the settlement was made, however, and it is averred, too, that even after this O'Connor notified plaintiff his fees were unpaid and that he still claimed his lien for compensation. But there is no averment that Mrs. Harrigan did discharge O'Connor as her counsel so as to divest his lien or right of recovery against plaintiff. We entertain no doubt that, notwithstanding the attorney's lien statutes, a client may, for sufficient cause, discharge counsel, and it may be under proper circumstances the lien of a recreant so discharged may be forfeited. But there is

no averment in the bill before us that Mrs. Harrigan discharged O'Connor or that she had any cause to so do. There is no suggestion that he was recreant to his trust. The bill avers only that she attempted his discharge and in the absence of averments to the effect that he was actually discharged and setting forth good cause therefor, it appears from the bill that O'Connor continued as counsel for Mrs. Harrigan at the time the settlement was made with her.

The allegations in the bill pertaining to the other attorneys do not import any right whatever in them to the fund referred to as against defendant O'Connor, for those allegations omit to suggest that those attorneys were employed by Mrs. Harrigan with respect to the claim or cause of action on which O'Connor had instituted the suit. It is averred, substantially, upon information and belief, that Mary Harrigan also entered into an agreement with defendants Albert E. Hausmann, John E. Bishop & Thomas A Cobbs, whereby Mrs. Harrigan agreed to pay Bishop & Cobbs and Hausmann fifty per cent of the amount recovered by her and that said attorneys claim a lien on the fund arising from the settlement of the alleged cause of action of Mrs. Harrigan. Not a word in this allegation suggests that Mrs. Harrigan employed these attorneys for the purpose of performing any service for her with respect to the cause of action on which O'Connor had instituted a suit. So far as the allegations of the bill touching this matter are concerned, it may be Mrs. Harrigan employed the several attorneys last referred to for the purpose of performing legal services as to an entirely different matter and agreed to give them a lien on the indential fifty per cent of her cause of action against plaintiff on which O'Connor had instituted the suit, for it is not averred these attorneys claim their lien under the statutes quoted. The bill avers, too, that Bishop & Cobbs and Hausmann rendered certain legal services to said Mary Harrigan but plaintiff avers that it is not familiar with the

exact nature of such services. Not a word in this averment suggests that the attorneys mentioned rendered any service touching the cause of action on which O'Connor had instituted the suit and so it is throughout the bill—no averment appears to the effect that Bishop & Cobbs and Hausmann were employed or ever performed any service touching the cause of action on which O'Connor's lien had attached. It is true there is an averment to the effect the claims of Bishop & Cobbs and Hausmann and O'Connor are indetical and for the same sum and are not independent, but inferences are not indulged in aid of the bill on demurrer as they are after judgment, when no demurrer has been interposed. No one can doubt that, in order to show a color of right in Bishop & Cobbs and Hausmann with respect to this fund as against defendant O'Connor, the bill should contain some pointed averment to the effect that these attorneys performed services for Mrs. Harrigan under an agreement with her as to compensation touching the indetical claim or cause of action on which O'Connor had instituted the suit, for unless such be shown, then no right of lien is suggested under the statutes in their favor against the indetical fund. The question as to whether or not Bishop & Cobbs and Hausmann were entitled to a lien on the indetical fund as that of O'Connor, if it appeared they had been employed in the indetical suit, is not made and will not be decided. It may be that it is not essential to show a color of right in the adverse claimants as a usual thing, but it is entirely clear, in the absence of averment in the bill showing defendants Bishop & Cobbs and Hausmann to have been employed or to have rendered services in the case of Mrs. Harrigan against plaintiff, that they had no enforceable right whatever as against defendant O'Connor with respect to the fund involved, for by operation of law Mary Harrigan had assigned that fund to O'Connor by her contract executed at the time of the institution of the suit, and she certainly could confer no rights on others

touching the same, unless it would be in a case where her original counsel was discharged for good cause, his rights forfeited and a new employment of other attorneys was made about the same subject-matter.

Among other things, a bill of interpleader should show not only the willingness of the stakeholder to render the debt or duty to the rightful claimant, but it should show as well that he is ignorant or in doubt which is the rightful one and is in real danger or hazard by means of such doubt from their conflicting demands. It is not required that the bill should show an apparent title in either of the defendants but if it does show on its face that one of the defendants is certainly entitled, on the facts alleged, to the debt, duty or fund as against the other defendant therein, then it is insufficient on demurrer, for the reason that it reveals no question of doubt about which the aid of the court should be invoked. [4 Pomeroy's Eq. Jur. (3 Ed.), sec. 1328.] We believe it is universally true that where the averments of the bill show one of the defendants is entitled to the fund to the exclusion of the other, a demurrer should be sustained. [Bassett v. Leslie, 123 N. Y. 396; Woodmen of the World v. Wood, 100 Mo. App. 655, 75 S. W. 377; Crass v. Memphis, etc., R. Co., 96 Ala. 447; 11 Ency. Pl. and Pr. 461, 468; Funk v. Avery, 84 Mo. App. 490; Sullivan v. Knights of Father Mathew, 73 Mo. App. 43; 23 Cyc. 25, 26; 4 Pomeroy's Eq. Jur. (3 Ed.), sec. 1328; Starling v. Brown, 7 Bush 164; Story's Eq. Jur. sec. 821.] The rule that a demurrer will lie in such circumstances and the grounds upon which it proceeds are thus stated by numerous authorities: "If the plaintiff states a case in his bill which shows that one of the defendants is entitled to the debt or duty, both defendants may demur; the one upon the ground that plaintiff has a perfect defense at law against his claim, and the other on the ground that plaintiff has neither a legal nor an equitable defense to his claim, and has therefore no right to call upon

him to interplead with a third person who claims without right." [Shaw v. Coster, 8 Paige (N. Y.) 348; Parker v. Barker, 42 N. H. 78, 93; Briant v. Reed, 14 N. J. Eq. 271; Starling v. Brown, 7 Bush. (Ky.) 164; Sprague v. West, 127 Mass 471; Crass v. Memphis, etc., R. Co., 96 Ala. 447.]

It appearing from the bill that plaintiff is liable to respond to defendant O'Connor to the amount of the fund and that defendants Bishop & Cobbs and Hausmann are without right as against him, or clearly without any enforceable right to the exclusion of O'Connor, as the facts are averred, the court very properly sustained the demurrer and the judgment should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

LACY M. LOVE, Appellant, v. HARTFORD LIFE INSURANCE COMPANY, Respondent.

St. Louis Court of Appeals, November 29, 1910.

1. **BILL OF INTERPLEADER: Scope of Remedy: Independent Liability.** The right of interpleader does not exist where the party seeking the relief has placed himself under an independent liability to either of the claimants, beyond the liability which arises from the title to the property or fund in controversy.
2. ———: ———: ———: **Beneficiary and Assignee of Life Insurance Policy.** The insured and beneficiary assigned life insurance policies to a creditor, the assignment being consented to by the insurer, who agreed in writing to pay the creditor, upon the death of the insured, the amount of his insurable interest. After the death of the insured, the assignee brought suit to recover the amount of the policies, but the insurer interpleaded, claiming that the original beneficiary was still asserting a right to a part of the proceeds of the policies, tendered the amount of the policies into court, and averred that it had no interest in the matter, other than the payment

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of the amount to the person rightfully entitled to it, and was thereupon discharged. *Held*, that there was privity between the claimants, who derived their respective rights from the same contracts of insurance made by the defendant with the insured, and that the defendant had a right of interpleader.

3. **ASSIGNMENTS: Assignment of Life Insurance Policy to Creditor: Equitable Rights of Beneficiary.** If a balance of the proceeds of a life insurance policy remains, after satisfying a debt of insured, which the policy had been assigned by the insured and the beneficiary to secure, the equitable title to such balance resides in the beneficiary.
4. **BILL OF INTERPLEADER: Scope of Remedy: Contractual Relations Between Beneficiary and Claimant.** The mere fact that a contractual relation exists between the complainant and one of the claimants to a fund under which the fund is required to be paid to such claimant does not of itself defeat the right of interpleader, where there is privity between the claimants.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Williams*, Judge.

AFFIRMED AND REMANDED.

C. R. Skinker for appellant.

(1) Interpleader cannot be maintained, because respondent has incurred an independent liability to appellant. *Insurance Co. v. Kidder*, 162 Ind. 389; *Ludlow v. Strong*, 53 N. J. Eq. 326; *Wakeman v. Kingsland*, 46 N. J. Eq. 113; *French v. Robrchar*, 50 Vermont 43, 7; *Standley v. Roberts*, 59 Fed. 841; *Crawshay v. Thornton*, 2 My. and Cr. 1; *Sprague v. Soule*, 35 Mich. 35; *Cromwell v. Trust Co.*, 57 Hun. 151; *Pfister v. Wade*, 56 Cal. 46. (2) Respondent is not disinterested. *Hartsook v. Chrissman*, 114 Mo. App. 558; *Conley v. Insurance Co.*, 67 Ala. 477; *Insurance Co. v. Pingrey*, 141 Mass. 411; *Kyle v. Railroad*, 112 Ala. 610; *Ryan v. Lamson*, 44 Ill. App. 204; *Pfister v. Wade*, 56 Cal. 46. (3) The titles of appellant and Mrs. von Borcke are adverse. *Commissioners v. Safe Co.*, 133 U. S. 486;

Colortype Co. v. Continental Co., 188 U. S. 107; Mandeville v. Welch, 5 Wheat. 286; Morrill v. Insurance Co., 183 Ill. 260. (4) The same debt is not claimed by appellant and Mrs. von Boreke. Glyn v. Duesbury, 11 Sim. 148; Johnson v. Atkinson, 3 Anstr. 798; Standley v. Roberts, 59 Fed. 84; Conley v. Insurance Co., 67 Ala. 477; Pfister v. Wade, 56 Cal. 46. (5) Respondent raises a question as to the amount due. Smith v. Grand Lodge, 125 Mo. App. 207. (6) Appellant has a clear right to collect the proceeds from respondent. Woodmen v. Wood, 100 Mo. App. 658; Sullivan v. Knights of Father Mathew, 73 Mo. App. 45; Funk v. Avery, 84 Mo. App. 494.

Jones, Jones, Hocker & Davis for respondent.

The judgment of the court permitting the bill of interpleader and ordering the money to be paid into court was right and equitable and should be affirmed. Roselle v. Bank, 119 Mo. 84; School Dist. v. Weston, 31 Mich. 85; Morrill v. Ins. Co., 183 Ill. 260; N. Y. Mut. Life Ins. Co. v. Richards, 99 Mo. App. 88; Woodmen of the World v. Wood, 100 Mo. App. 655; Supreme Council L. of H. v. Palmer, 107 Mo. App. 157.

NORTONI, J.—This is a suit on two policies of life insurance, but the question for decision relates to defendant's right of interpleader which is interposed in its answer. The court granted the relief prayed for in respect of this matter, directed the claimants to interplead for the fund which was paid into court, discharged defendant, and plaintiff prosecutes the appeal from that judgment.

Defendant is an incorporated life insurance company and it appears that it issued two policies of insurance, numbered 21, 261 and 21, 262, of \$1000 each, on the life of Charles A. von Boreke in 1881. Both of these policies were made payable to Mary L. von Boreke, wife of the insured, who was denominated as the bene-

fiary therein. Afterward, in August, 1906, the insured, Charles A. von Borcke, and his wife, Mary L. von Borcke, sole beneficiary under the policies, for value, assigned each of said policies in writing to plaintiff Love, a creditor of the insured, Charles A. von Borcke, and directed the same to be paid to him on the death of the insured as his interest might appear. The assignment of the two policies was duly executed by both the insured and his wife, Mary L. von Borcke, the beneficiary, annexed to the policies and approved and accepted by defendant insurance company in writing indorsed thereon.

All the premiums were duly paid and the insured departed this life February 27, 1908. Thereafter proofs of death were duly made by plaintiff Love, assignee of the policies, but defendant neglected to pay the amounts due thereunder for the reason Mrs. von Borcke, the widow, notified it that she laid claim to a portion of the fund. Plaintiff Love, the assignee of the policies, thereupon instituted this suit against the insurance company to the end of recovering the amount of the two policies together with interest thereon, and defendant answered by way of an interpleader. In its answer, defendant admitted its obligation to pay the amount sued for to some one, recited the facts pertaining to the assignment of the policies to Love and that the original beneficiary, Mrs. von Borcke, claimed either all or a portion of the fund in its hands. Defendant tendered the amount of the policies, together with the accrued interest thereon, into court, said that it had no interest in the matter whatever, other than that the fund should be paid to the rightful owner or properly distributed, prayed the court to order the parties to interplead and discharge it from further responsibility, etc. On a hearing, the facts above set forth appeared to be uncontroverted. Mrs. von Borcke admitted having joined with her husband, the insured, in executing the assignment of the policies to plaintiff, her husband's

creditor, as his interest might appear and that plaintiff is entitled to a considerable portion of the fund, but she asserted a claim to some part thereof, which, of course, on the present hearing, was not ascertained. On the other hand, it is conceded by defendant insurance company that it consented to the assignment of the policies to plaintiff and agreed in writing at the time of the assignment to pay him on receipt of proper proof of death of the insured and the insurable interest of creditor. The court declared defendant's right to the relief prayed for, allowed it a reasonable attorney's fee and other costs and upon its paying the fund into court, less the attorney's fees and such costs, ordered its discharge and directed an interpleading between Mrs. von Borcke and plaintiff for the fund.

It is argued by plaintiff that the court erred in giving this decree for the reason it conclusively appears defendant is not a mere disinterested stakeholder between him and Mrs. von Borcke as by accepting and approving the assignment of the policies it contracted to pay the fund to plaintiff. There can be no doubt of the general principle of equity which operates to inhibit the right of interpleader in those cases where the party seeking the relief has placed himself under an independent liability to either of the claimants beyond the liability which arises from the title to the property or fund in controversy. The principle proceeds in accordance with the precepts of natural justice, for, as a rule, the court ought not to entertain the bill and award an injunction against the prosecution of a suit when such an independent obligation appears. Furthermore, sustaining the bill in such circumstances operates to discharge the interpleader of the duty to respond to such independent undertaking without a hearing as to that fact. The principle obtains, too, we believe, because in respect of such independent promise there is no privity between the claimants, but it exists solely between the party praying for the relief and the parti-

cular claimant to whom the promise was made. [See 4 Pomeroy's Eq. Jur. (3 Ed.), secs. 1326, 1327; Beach's Mod. Eq. sec. 143; 23 Cyc. 5, 6, 7, 8; 11 Ency. Pl. and Pr. 459; Northwestern Ins. Co. v. Kidder, 162 Ind. 382; Sprague v. Soule, 35 Mich. 35; Pfister v. Wade, 56 Cal. 43; Crawshay v. Thornton, 2 My. & Cr. 1; Standley v. Roberts, 59 Fed. 836, 841; French v. Robrecht, 50 Vt. 43.]

In accordance with this doctrine, the High Court of Chancery in England denied the right of B & Co., wharfingers, to interplead in a case where A deposited certain iron with B & Co. and directed them to deliver it to C. It appears that B & Co. thereafter entered the same in their books as to the account of C and wrote him a letter saying that the annexed note was of the landing weights of the iron transferred into his name by A and now held by them, (B & Co.), at (C's) disposal. Upon D subsequently laying claim to the iron and asserting that A, who had deposited it with B & Co. for C, had done so without authority on converting it from the true owner, D, B & Co. filed their bill praying that the court require C, to whom they had made the independent promise, and D, the alleged owner, to interplead for the iron. The court denied the bill because of the independent obligation with respect to the matter which B & Co. had assumed toward C by entering the iron on their books in his name and writing him the letter above mentioned. [Crawshay v. Thornton, 2 My. and Cr. 1.] But, upon scrutinizing this case, it will appear that no privity whatever existed between the claimants, C and D, and that their titles were not derived from a common source; for, while C's title was derived from A, who deposited the iron with B & Co., D's title was wholly independent of and paramount to that of A, who indeed was a tortfeasor, in that he had converted the iron from D, the true owner. A study of that case, however, will reveal instances cited where interpleader will lie, even though an independent obligation

exists to one of the claimants, if the several claimants are in privity and it appears their several rights are derivative. Under the rule above suggested, interpleader has been denied, too, in a case where it appears a lessee had leased a mine by a separate indenture from two different persons asserting adverse ownership. Of course, there was no privity in such circumstances and the right to interplead the two separate lessors under independent and separate contracts of lease was denied. The lessee having thus obligated himself independently to respond to two separate landlords was not entitled to the aid of the court to have them interplead for the rents. By his express covenant he had agreed to pay both. [Standley v. Roberts, 59 Fed. 836; see, also, Hartsook, etc., v. Chrissman, 114 Mo. App. 558, 90 S. W. 116.] A leading case is that of Pfister v. Wade, 56 Cal. 43. In that case, it appeared that plaintiff purchased of T wheat which was then in the possession of W, and upon which W claimed a lien. W delivered the wheat to plaintiff, the purchaser, however, upon the express condition that plaintiff should retain out of the purchase money due from him to T the sum of money due W. Afterward T assigned to B his claim against plaintiffs on account of the wheat. In a suit by plaintiffs to compel W and B to interplead with regard to their respective claims, the right was denied, for it was said plaintiff had assumed an independent obligation to each. The proposition is entirely sound, as there was no privity of right between the claimants, B and W, for W derived his right directly from the plaintiff on his promise to pay in consideration of W releasing his lien and B derived his right through the assignment of the purchase money from T, who owned and sold the wheat.

¶ So much for the rule referred to and its usual application. It is certainly without influence on the facts in judgment here, for in the instant case, though the claimant, Mrs. von Borcke, theretofore joined in assign-

ing the policies to Love, she notwithstanding claimed an interest in the fund and in this claim she derived her right through the identical contracts of insurance from whence Love derived his. There can be no doubt of the fact that privity existed between Mrs. von Borcke and plaintiff Love, for she as beneficiary in the policies had joined in their assignment to plaintiff, the creditor, as his interest might appear. If a balance remains after discharging plaintiff's debt, the equitable right to that balance resides in Mrs. von Borcke under the fair construction of the assignments. The privity between plaintiff and the other claimant, Mrs. von Borcke, is therefore entirely clear. They each derived their rights through the identical contracts of insurance made by von Borcke with defendant company and payable according to the equities in the case in part to one and in part to the other claimant. Mr. Pomeroy, in his valuable work on Eq. Jur., vol. 4 (3 Ed.) points out in the notes to sections 1327, 1328 that insurance companies may compel opposing claimants of the insurance to interplead when they claim by assignment from the assured or by mortgage or by attachment, etc., that is, when there is present essential privity and they claim derivatively. The following cases cited by the author, which we have examined, are in point and support the general proposition asserted: *Nelson v. Barter*, 2 Hem. and M. 334; *Hamilton v. Marks*, 5 De Gex and S. 638; *Spring v. S. C. Ins. Co.*, 8 Wheat. 268. That the mere fact a contractual relation exists between the party seeking interpleader and one of the claimants to the fund requiring its payment to such party will not of itself defeat the right of interpleader was declared in an instructive opinion by the Supreme Court of Pennsylvania. [See *Bechtel v. Sheafer*, 117 Pa. 555.] In that case Sheafer had contracted by due bill to pay Bechtel \$2000. Bechtel sued Sheafer, the maker of the due bill, thereon and he answered by tendering the fund into court and praying that one, Batdorf, be required to interplead

Bechtel therefor. It appearing Batdorf claimed his right by an assignment from Bechtel, the payee in the due bill, the court declared the case one of interpleader notwithstanding the direct promise contained in the due bill to pay Bechtel, the plaintiff. The case reveals privity between the two claimants, for Batdorf asserted his right as derived through an assignment from Bechtel, the plaintiff. There are numerous cases involving immediate and direct promises to pay one of the parties where the right of interpleader has been sustained on privity appearing between the claimants and derivative rights disclosed. 1

No one can doubt that the relation of debtor and creditor obtains between a bank and its depositor. Notwithstanding this, in *City Bank of N. Y. v. Skelton*, 2 Blatchf. 14, the bank was permitted to interplead its depositor and another in respect of a fund held by it on deposit. In that case it appeared the depositor was the executor of Frazier and held the fund or derived his right as such. The other claimants, being the heirs of Frazier, of course derived their right from him. [See, also, *1st Nat'l Bank v. West River R. R. Co.*, 46 Vt. 633.] Notwithstanding the direct promise to pay the holder contained in a negotiable promissory note, in *Howe Mach. Co. v. Gifford*, 66 Barb. (N. Y.) 597, the maker of such a note was permitted to interplead the holder and another with respect to the fund it represented. Privity appeared in that case as well. Both claimants derived their rights through the original payee. So, in our own court, though a loan company had expressly agreed to pay a fund in liquidation of a judgment establishing a mechanic's lien, it was permitted to interplead the borrower to whom the promise was made and others. On a study of that case, it appears, all of the claimants there involved derived their rights through one Albers, who owned the judgment sustaining the mechanic's lien to which the fund was to be applied. [Franco, etc., *L. & B. Ass'n v. Joy*, 56 Mo. App. 433.] In *Roselle v. Far-*

mers' Bank, etc., 119 Mo. 84, 24 S. W. 744, though the question of an independent liability was not suggested, our Supreme Court sustained the right of the bank to interplead seven joint owners of a deposit. It appeared that one of the parties deposited the draft with the bank for himself and six others, but afterward demanded the entire sum for himself, and sued the bank on the theory that it owed him as the depositor the entire amount. The bank set forth the claims of the six other parties and the Supreme Court declared it a proper case of interpleader. If that case reveals a direct obligation to pay the depositor, there appears as well a right in each and all of the claimants derived from the same source. It is true no question was made with respect to the matter now under consideration, nevertheless the principle we have pointed out is reflected by that judgment, for the fact of derivative right obtained in the case. The case of *Woodman of the World v. Wood*, 100 Mo. App. 655, 75 S. W. 377, presented the question in judgment here, but it was not discussed in the opinion, for the point was not made. The case involved a certificate of life insurance issued by a benevolent association in which, of course, under the law, the insured is permitted to change the beneficiary at his pleasure. The insured had caused a new certificate to be issued in favor of his two sisters as beneficiaries in lieu of his wife. After the death of insured, the society interpleaded the two sisters to whom they had issued the new certificate and the widow, who was beneficiary under the old, all of the parties having asserted a claim to the fund. The claim of the widow was that because of mental impairment her husband was incompetent to change the beneficiary and therefore her right remained intact, as no new contract of insurance had been entered into. The court sustained the prayer for an interpleading and this too notwithstanding it appeared a new and direct promise had been made to the insured's two sisters by the more recent certificate issued to them. It

appears that while the several claimants in that case did not all derive their right from the same or indential paper contract, they nevertheless derived it from the same undertaking of the insurance company with the insured to pay the stipulated amount of insurance to his lawfully designated beneficiary. Though the question was not made or discussed, see, also, *Mut. Life Ins. Co. v. Richards*, 99 Mo. App. 88, 72 S. W. 487.

It appearing that both the claimants in this case derived the rights they assert from the same source and that defendant is wholly unconcerned as to who shall have the fund, except in so far as to exercise diligence to have it paid to or distributed between the right parties, the case is clearly one of interpleader and this, too, notwithstanding defendant's promise to Love, involved in consenting to the assignment of the policies. The judgment of interpleader should be affirmed and the cause remanded for such further proceedings as are proper between the claimants. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

MINNIE E. BANGE, Appellant, v. SUPREME
COUNCIL LEGION OF HONOR OF MISSOURI,
Respondent.

St. Louis Court of Appeals, November 29, 1910.

1. **FRATERNAL BENEFICIARY ASSOCIATIONS: Non-Payment of Assessments: Forfeiture: Notice.** The laws of a fraternal beneficiary association required that every member should pay assessments within thirty days from the call; that a failure to do so before the first meeting of his council after the expiration of the thirty days operated to suspend the member, except that any council, by a majority vote, might authorize the payment of the member's assessment as a loan or gift from its funds, such payments being made within the thirty days specified. *Held*, that where a local council declined to pay a mem-

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ber's assessment under a call, though having paid several prior assessments, such declination did not of itself forfeit the member's certificate, unless he had notice that the call had been made, or received notice of the forfeiture and acquiesced therein.

2. **FORFEITURE: Not Favored: Notice.** Forfeitures are not favored in the law and are, therefore, not to be allowed, unless it appears the party whose rights are sought to be thus summarily determined against him has had such reasonable notice as the law requires.
3. **FRATERNAL BENEFICIARY ASSOCIATIONS: Non-Payment of Assessment: Forfeiture: Notice: Question for Jury.** Whether a notice of an assessment on mutual benefit certificates was mailed to the insured's regular address as required by the policy, *held* for the jury.
4. ———: ———: ———: ———: **Instructions.** In an action against a fraternal beneficiary association, where insured, at the time the certificate was issued, resided in St. Louis, but afterwards went to Chicago, where he remained for some time seeking employment, an instruction that if insured's regular address at the time the call was made, for the non-payment of which he was suspended, was in Chicago, and not in St. Louis, where the notice was sent, yet if the notice of the call and suspension were forwarded to and received by insured in Chicago or actual notice thereof reached him, prior to his death and in time for him to have made application for reinstatement as a member, then the verdict should be for defendant, was erroneous for failing to instruct that, in the event the jury believed the notice was not mailed to insured's regular address, they must find that he actually received the same within the thirty days prescribed for payment by the company's by-laws, before a verdict for defendant would be proper.
5. ———: ———: ———: ———: **Erroneously Addressed.** Where the insured receives notice of an assessment levied by a fraternal beneficiary association in time to pay the same within the time prescribed by the by-laws, the fact that the notice was erroneously addressed would be immaterial.
6. ———: ———: ———: ———: ———. Where notice of an assessment levied by a fraternal beneficiary association is not mailed to the regular address of the insured, he ought not to be declared in default unless he received it in time to have paid the assessment within the time prescribed by the by-laws; for the mere deposit of a notice in the mail is insufficient where it is not mailed to the regular address of insured.
7. ———: ———: ———: **Waiver.** Where a fraternal beneficiary association was sued on a certificate and relied exclusively on

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a forfeiture for the non-payment of a particular assessment after notice, and the judgment rendered was reversed on appeal, defendant would not, on retrial, be permitted to claim a forfeiture on the further ground of non-payment of a specified per capita tax.

8. **INSURANCE: Forfeiture: Waiver.** Where the insurer, while in possession of all the facts, omits to invoke a forfeiture and induces the beneficiary to enter upon the expenditure of a considerable sum of money or to materially change his position by litigating another matter relied upon as a defense, it waives the forfeiture.
9. ———: ———: ———: **Consent Necessary to Subsequent Invocation.** And such forfeiture, having once been waived, may not thereafter be invoked without consent.

Appeal from St. Louis City Circuit Court.—*Hon. William M. Kinsey*, Judge.

REVERSED AND REMANDED.

James J. O'Donohoe for appellant.

(1) The defense of suspension for the non-payment of dues has been waived by defendant denying liability and defending on other grounds. This defense comes too late on second trial in the circuit court. *Carp v. Queen Ins. Co.*, 116 Mo. App. 543; *Mining Co. v. Fidelity & Casualty Co.*, 126 Mo. App. 104; *Dolan v. Town Mutual Fire Ins. Co.*, 88 Mo. App. 666. (2) The issue of the certificate and Bange's death were proven upon the trial and the same made a prima facie right of recovery in appellant. *Mulroy v. Knights*, 28 Mo. App. 468; *Stewart v. Legion of Honor*, 36 Mo. App. 319; *Forse v. Knights of Honor*, 41 Mo. App. 106; *Mulroy v. Knights*, 28 Mo. App. 468; *Chadwick v. Triple Alliance*, 56 Mo. App. 474. And since the defendant failed to establish any of its affirmative defenses plaintiff's peremptory instruction should have been given. *Gruwell v. Knights and Ladies of Security*, 126 Mo. App. 496. (3) Neither section 2 of law 6 of defendant's laws touching the payment of dues, nor section 3 of said law

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6 in reference to the payment of contributions is self-executing. *Bange v. Supreme Council Legion of Honor*, 128 Mo. App. 461; *Seehorn v. Catholic K. of A.*, 95 Mo. App. 233; *Puhr v. Grand Lodge*, 77 Mo. App. 47; *Lewis v. Benefit Ass'n*, 77 Mo. App. 586; *McMahon v. Maccabees*, 151 Mo. 522. Defendant by its rules for the government of subordinate councils together with *Lindsley's* letter and its general course of dealing with Bange and the other members, waived the prompt payment of dues and contributions. *Burke v. Grand Lodge A. Q. U. W.*, 136 Mo. App. 450; *Dolan v. Royal Neighbors of America*, 123 Mo. App. 147; *Andre v. Modern Woodmen*, 102 Mo. App. 377; *Cauveren v. Ancient Order of Pyramids*, 98 Mo. App. 433; *Courtney v. St. Louis Police Relief Ass'n*, 101 Mo. App. 261; *Frame v. Woodmen of the World*, 67 Mo. App. 127; *Knights of Pythias v. Withers*, 177 U. S. 260. (4) The court erred in refusing to give plaintiff's instructions. And erred in giving defendants.

The instruction given by the court of its own motion is erroneous. *Bange v. Supreme Council Legion of Honor*, 128 Mo. 461; *Meisenbach v. Supreme Tent, Knight of the Maccabees of the World*, 119 S. W. Rep. 514. The burden of proving notice rests upon the party asserting its existence. 21 Am. and Eng. Ency. of Law (2 Ed.), p. 589; *Bartlett v. Varner*, 56 Ala. 580. No presumption that a letter reached the addressee arises unless it appears that the person resided in the city or town to which the letter was addressed. *Goodwin v. Provident Savings Life Assurance Society*, 97 Iowa 226, 66 N. W. R. 157, 32 L. R. A. 473.

Kincaly & Kinealy for respondent.

(1) The court correctly instructed the jury as to "regular address." *Bange v. Sup. Council L. of H.*, 128 Mo. App. 461. (2) Even if the court's definition of

“regular address” should be held incorrect, this would be immaterial because under the instructions the jury must necessarily have found that the proper notices were sent to deceased addressed either 2637 Park avenue, St. Louis, or 2094 Wilcox avenue, Chicago, and plaintiff and her mother both swore that all mail that came to the Park avenue address for deceased was at once forwarded to him at the Chicago address by appellant. Appellant is bound by this testimony of herself and mother. *Claffin v. Dodson*, 111 Mo. 195; *Bensberg v. Harris*, 46 Mo. App. 404. (3) Deceased having admittedly paid no dues for the two last quarters of 1904, and having died February 19, 1905, he stood suspended at that time on account of non-payment of dues, regardless of the question as to contributions. (4) There is no plea in the replication of any custom as to giving notice of dues, even if such custom could be relied on to nullify respondent’s laws. *Hayden v. Grillo*, 42 Mo. App. 1.

NORTONI, J.—This is a suit on a certificate of life insurance. The finding and judgment were for defendant and plaintiff prosecutes the appeal. The case was reviewed by the court on a former appeal. [See *Bange v. Supreme Council Legion of Honor*, 128 Mo. App. 461, 105 S. W. 1092.]

Defendant is a mutual benefit society operating under the lodge system of government and plaintiff’s husband, Julius A. Bange, became a member of its local lodge, Irving Council No. 2, in the year 1902. Upon becoming associated with the order, it issued to him its certificate of insurance on his life payable at his death to his wife, the present plaintiff, in amount not exceeding \$2000. At the time of effecting the insurance and until the 8th day of June, 1904, insured resided in the city of St. Louis where he had formerly been employed as a traveling salesman. He became unemployed, however, in the fall of 1903 and it seems remained so until about August, 1904, when he obtained a position in Chi-

cago as city salesman for a gents' patent collar. While thus unemployed, in the fall of 1903, insured abandoned housekeeping in St. Louis, stored his furniture in the basement beneath the residence of Mrs. Hobie, his wife's mother, with whom he and his wife and little boy took up their abode at 2637 Park avenue, St. Louis. The insured, together with his wife and child, continued to reside at this number with his mother-in-law until June 8, 1904, at which time he went to Chicago for the purpose of finding employment and locating there. Before leaving St. Louis, he paid up his contributions and dues in defendant order until July 1st of that year and overpaid the same to the extent of thirty-three cents, which amount remained on the books of the order to his credit. The insured omitted to pay the contributions which were called in aid of the insurance for the months of July, August and September, but his lodge, Irving Council No. 2, under a by-law authorizing it to do so, voluntarily paid these for him. When the October contribution was called, under the serial number of call 132, insured omitted to pay this as well and on the 9th day of November, thereafter, his council declared him suspended and the insurance involved forfeited for that particular default. Julius A. Bange, the insured, died in Texas, where he was engaged in traveling for a Chicago concern, on February 19, 1905, and this suit is prosecuted on the certificate of insurance, notwithstanding its alleged forfeiture and his suspension, as though the insurance continued in force because of defendant's failure to mail a notice of the call for contribution 132 and notice of the insured's suspension to his regular address, as the by-laws required. After admitting the issue of the certificate and other relevant facts, for a defense thereto, the answer pleaded the insurance therein vouchsafed had been forfeited and the insured suspended from membership in the order because of his failure to pay the contribution 132 called October 1, 1904.

Section 3 of law 6, general laws of defendant order, provides substantially that every member shall pay the amount of his contribution to the relief fund within thirty days from the date of the call therefor and any member failing to pay the same on or before the first meeting of his council, after the expiration of said thirty days, shall stand suspended from the order and from all benefits therefrom. It is further provided therein, however, that any council may, by a majority vote of its members present at the meeting, authorize the payment of the member's contribution as a loan or as a gift from its funds, but such payments must be made within the thirty days therein specified.

When the cause was here on the former appeal, we interpreted this by-law to the effect that it is not self-executing in operating the suspension of the member and a forfeiture at the end of the thirty days therein referred to, as the custom obtains thereunder, with defendant's consent, to await the next meeting of the council and its failure to pay the contribution for the member. In the present case, the council paid the contributions for the insured which were called in July, August and September, but on November 9th declined to pay call No. 132 for October. But this of itself does not operate a forfeiture of the insurance unless the insured had notice, actual or constructive, that the call, for the non-payment of which the forfeiture was declared, had been made, or thereafter received notice of the forfeiture and acquiesced therein. Forfeitures are not favored in the law and are therefore, not to be allowed unless it appears the party whose rights are sought to be thus summarily determined against him has had such reasonable notice as the laws require. [Settle v. Farmers', etc., Ass'n, 150 Mo. App. 520, 131 S. W. 136.] As to notices touching contributions called by the order, it is provided in its laws that it shall become the duty of the member to pay the same within thirty days after being notified by the recorder of his council. The notice re-

ferred to is sufficient, however, if directed by the recorder to the "regular address" of the member and deposited in the postoffice. The evidence is conclusive to the effect that no notice of the call for which the forfeiture was declared and no notice of the fact that the forfeiture had been declared and the member suspended was ever mailed by defendant's officers to the insured at Chicago, though it does appear such notices were mailed by the recorder of the local council and the proper officer of the Supreme Council to the address, 2637 Park avenue, St. Louis, where the insured resided prior to going to Chicago. As before stated, the regular address of the insured up to June 8, 1904, was undoubtedly at 2637 Park avenue, St. Louis, for he, together with his wife and child, resided there at that time. It appears Mr. Lindsley, the recorder of Irving Council No. 2, knew this fact and mailed the regular notices of calls to the insured at that number, but on June 8, 1904, insured, having been unsuccessful in obtaining a position in St. Louis, went to Chicago in search of employment and thereby changed his regular address to 2094 Wilcox avenue, Chicago. Mrs. Bange, his wife, went to Chicago in July and remained there with her husband for about six weeks and until the early part of September, when she returned to her mother's at 2637 Park avenue, St. Louis, because her husband had not yet obtained employment and was unable to furnish her a home with him. There is testimony tending to prove the insured resided with his sister in Chicago at 2094 Wilcox avenue from June 8, 1904 until January 26, 1905, when he left there for Texas to travel for the Swift Packing Company, with whom he had obtained employment in Chicago. It appears by the uncontroverted proof that the recorder of Irving Council No. 2, Mr. Lindsley, knew at one time the insured resided at 2094 Wilcox avenue in Chicago, for he admits in his testimony that he received a letter from the insured conveying this address while

there pertaining to his insurance and a letter in evidence from Mr. Lindsley to the insured, dated August 18th, is addressed to the insured at 2094 Wilcox avenue, Chicago. This letter from Mr. Lindsley to the insured assures him that the council would pay his assessments for a reasonable length of time. The letter further expresses the hope that insured would find employment and requested the insured to present the regards of the writer to Mrs. Bange. It appears clearly from this that the recorder of Irving Council No. 2 not only knew the insured was in Chicago and living at 2094 Wilcox avenue at that time but knew as well that his wife was with him there in August. It is in testimony, too, that Mr. Lindsley, the recorder, called at the home of Mrs. Hobie, 2637 Park avenue in St. Louis, several times during the fall of 1904 after Mrs. Bange had returned from Chicago in September and conversed with her as to the matter of the insured's contributions which were then being carried by the council. Besides Mrs. Hobie, the insured's mother-in-law, told him Bange's address in Chicago and he knew that the insured was not living at 2637 Park avenue in St. Louis, for he was not there when Lindsley called. After the insured went to Chicago in June, he first obtained employment as city salesman for a gents' patent collar but it seems this employment did not prove to be remunerative and he was unable to maintain his family there. The proof is, that because of this fact, Mrs. Bange returned to her mother's in St. Louis to await her husband's obtaining something more substantial. For a few weeks prior to Christmas, 1904, the insured was employed as a floor walker in Marshall Field's store in Chicago and finally succeeded in obtaining employment with the Swift Packing Company, in whose service he went to Texas January 26, 1905, where he died on February 19th thereafter.

A witness testified that he saw Mr. Bange in St. Louis several times during the winter before he died, but there is no pointed statement in his testimony indi-

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cating that Bange's regular address was 2637 Park avenue, St. Louis, after June 8, 1904, for he did not speak on that subject. Both Mrs. Bange and her mother gave testimony to the effect that he came to St. Louis twice from Chicago, during the interim, to visit his family. On November 18, which was Mrs. Bange's birthday, the insured came to St. Louis, visited her and returned to Chicago the following night. Again, on January 23, 1905, he came from Chicago to St. Louis and spent two days with his family immediately prior to embarking on his tour in Texas.

When the case was here on a former appeal, the court declared the by-law requiring notice to be sent to the "regular address" of the member to intend that the notice shall be mailed to the address where the member will be likely to get it, if such address is known to the recorder. [Bange v. Supreme Council Legion of Honor of Mo., 128 Mo. App. 461, 473, 105 S. W. 1092.]

As it is conceded that notice of assessment No. 132 was not mailed by defendant to Bange's Chicago address, it is argued the court should have directed a verdict for plaintiff on that score. The argument is, that in accordance with the views expressed on the former appeal the evidence is conclusive that 2637 Park avenue was not Bange's regular address, for though his wife and child resided there with her mother, his regular address was in Chicago, where he was seeking employment. We have duly weighed this argument and believe, in view of other portions of Lindsley's testimony, it is a matter for the jury. The case concedes Lindsley knew Bange's address in Chicago in August and no doubt for some time thereafter, but the evidence is not conclusive as to his knowledge on the subject in October, when the call for assessment No. 132 was issued. Lindsley, the recorder, testified he did not know Bange's address at this time, for Mrs. Bange informed him when he called to see her about the contributions that her husband had accepted employment in Chicago, lost

his position and "disappeared." The witness said he then considered him a "bird of passage." It is true the question is not one of domicile and does not necessarily turn on the intention of Bange, but, nevertheless, in so far as the rights of the parties to this record are concerned, Lindsley was justified in accepting plaintiff, Mrs. Bange's, statement made at or immediately prior to October 1st that her husband had "disappeared," and conduct himself as though 2637 Park avenue was his regular address thereafter. The matter is to be considered in view of the fact that Bange and his wife were not separated and that she, his child and all of their household effects were at 2637 Park avenue, for if Bange had disappeared from Chicago and abandoned his address there, then 2637 Park avenue St. Louis would be the place where he would most likely receive his mail and expect it to be addressed. In view of this testimony, and the considerations suggested, we believe Bange's regular address under the circumstances of the case was a question for the jury.

The court instructed the jury that one of the questions which it should determine was whether, during the months of October and November, 1904, the regular address of Julius A. Bange was at 2637 Park avenue in the city of St. Louis or at 2094 Wilcox avenue in Chicago, Illinois; that the by-laws governing defendant required the recorder of Irving Council No. 2 to send notices of contributions, which Bange was required to pay, to his regular address, and that by the words "regular address," as used in the by-laws, is intended the place where the member is known by the recorder most likely to receive his mail; that is the place where he is known to expect his mail to be addressed to him and where he usually receives it, although he may not always be present at such place; that in determining whether, at the time mentioned, the regular address of deceased was 2637 Park avenue, St. Louis or 2094 Wilcox avenue, Chicago, the jury should take into consideration all of

the facts and circumstances in evidence tending to show whether deceased expected regularly to receive his mail at one place rather than the other, in the absence of any special direction, and also tending to show what knowledge or information, if any, the recorder of Irving Council No. 2 had of this intention. The jury was also told in the same instruction that if it believed from the evidence that No. 2637 Park avenue in St. Louis was the regular address of deceased at the time mentioned above and that the recorder of Irving Council, on or about the first day of October, 1904, deposited in the United States mail, postage prepaid, addressed to the deceased at such place, a notice or call for the contribution due from him for the month of October, 1904; that said contribution was not paid by deceased or any person for him, on or about the first meeting night in November, 1904, and that thereupon he was suspended by said council at said meeting for the non-payment of said contribution and that notice of such suspension was deposited in the mail by the Supreme Recorder of defendant, postage prepaid, and addressed to deceased at said number on Park avenue, in St. Louis, and that thereafter deceased made no application to be reinstated in said council prior to his death, then the verdict should be for defendant. We believe so much of the instruction was sufficient, for there was evidence tending to support all of the propositions hypothesized there, though we have not mentioned it all, as some portions are unimportant on this appeal. But the succeeding paragraph of the instruction we deem to be unsound, for it omits to inform the jury that if Bange received notice of the assessment by its being forwarded to him in Chicago, he was not bound by it, as a predicate for the forfeiture of his rights, unless he received it in time to have paid the assessment within the thirty day limit prescribed in the by-law. When the case was here on the former appeal, it was ruled, in view of the testimony of Lindsley about sending notice of the call to 2637 Park avenue and the

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testimony of Mrs. Hobie, deceased's mother-in-law, that all mail received there for Bange was promptly forwarded to him in Chicago, the jury might infer that Bange actually received such notice, though it was not directed to his regular address. On this hypothesis, if he did so receive the notice through the process of forwarding in time to pay during the thirty days allowed him by the by-law for that purpose, the mere circumstance that the notice was erroneously addressed would be immaterial. [Bange v. Sup. Council Leg. of Honor of Mo., 128 Mo. App. 461, 473, 474, 105 S. W. 1092.] By the concluding paragraph under discussion, the court directed the jury that although it should believe from the evidence the regular address of the deceased at the time mentioned was 2094 Wilcox avenue, Chicago, and not 2637 Park avenue, St. Louis, yet if it found that the notice of the contribution and of the suspension were forwarded and received by deceased at his regular address in Chicago or that actual notice thereof reached him in any manner prior to his death and in time for him to have made application for reinstatement as a member, then the verdict should be for defendant. This portion of the instruction authorized a verdict for defendant if the jury found Bange received a notice which had been directed to 2637 Park avenue, St. Louis and perchance had been forwarded by his mother-in-law though he did not receive it until after the thirty days' limit for payment prescribed in the by-law had expired. It hypothesizes a case which concedes Bange's regular address to have been in Chicago and that notice mailed to Park avenue, St. Louis, was not a performance of the condition prescribed by the by-law on which a forfeiture may be declared. In those circumstances, when the notice is not mailed to the regular address, the insured ought not to be declared in default unless he received the notice in time to have protected his insurance within the thirty day limit, for the mere deposit in the mail is insufficient when the notice is not mailed to the reg-

ular address. In other words, unless the jury find the fact to be that he received the notice through its being forwarded in time to have paid the assessment within the thirty day limit therefor, the rights of the insured ought not to be forfeited as for his default. This error is material, for it may be the jury found the notice was forwarded and though not received until after the thirty days had expired, considered it a sufficient basis for the forfeiture.

One of defendant's by-laws required each member to pay dues and per capita tax at the rate of \$1.50 per quarter. Another section provides that any member who should become six months in arrears with respect to such dues shall stand suspended. These by-laws may be self-executing as there seems to be no provision for notice. But whether they are or not it is unnecessary to examine minutely, for that they are self-executing will be conceded but not decided. It appears the insured, Bange, omitted to pay his dues and was six months in arrears February 1st, 1905. He died February 19, of the same year. It is argued that the insured's membership and insurance were forfeited because of this fact. Had a forfeiture of the insurance been predicated on this ground in the first instance, it may be the argument would prevail, but, as it is, defendant must be treated as having waived the matter, for it appears no such question was raised in the original answer nor until after the case had been tried and the judgment reversed on the former appeal. After the cause was remanded, defendant filed an amended answer by which, for the first time, it invoked a forfeiture for the non-payment of dues. Plaintiff joined issues with defendant on the first answer which set forth a forfeiture solely on the ground of non-payment of contribution No. 132 after notice thereof and a trial was had with respect to that matter. On that issue alone, the court on the former trial directed a verdict for defendant and thus entailed the expense and trouble of an

appeal to this court, which reversed and remanded the case as will appear by reference to Bange v. Sup. Council Leg. of Honor of Mo., 128 Mo. App. 461, 105 S. W. 1092. There can be no doubt of the proposition that a forfeiture may be declared waived, if it appears the insurer, while in possession of all the facts with respect to the matter, omits to invoke it and induces the beneficiary to enter upon the expenditure of a considerable sum of money or materially changes his or her position by litigating another matter relied upon as a defense. Such conduct on the part of the insurer introduces an element of estoppel and renders the waiver complete. [2 Bacon on Benefit Societies (3 Ed.), sec. 423; Carp v. Queen Ins. Co., 116 Mo. App. 528, 542, 544, 545, 92 S. W. 1137.] So it is in this case, defendant having relied exclusively upon a forfeiture for the non-payment of contribution No. 132, after notice, on the former trial and appeal, will not now be permitted to invoke a forfeiture on a new and distinct ground with respect to the facts of which it was fully advised when the first answer was filed. [See Carp v. Queen Ins. Co., 116 Mo. App. 528, 542, 543, 92 S. W. 1137.] The matter having been once waived may not be invoked thereafter without consent. [Porter v. German Am. Ins. Co., 62 Mo. App. 520.] The judgment should be reversed and the cause remanded. It is so ordered. *Caulfield, J.*, concurs. *Reynolds, P. J.*, not sitting.

HARRY G. KNAPP, Appellant, v. JOSEPH L.
HANLEY, Respondent.

St. Louis Court of Appeals, Argued and Submitted November 10,
1910. Opinion Filed November 29, 1910.

1. **APPELLATE PRACTICE: Review: Weight of Evidence.** The weight of the evidence is for the trial court, and the appellate court will not disturb its conclusion, unless the verdict is grossly contrary to the evidence, or is entirely unsupported by any evidence of a substantial and probative character.
2. ———: **Changing Theory on Appeal.** Where cases are tried on theories not altogether in line with the pleadings, the parties on appeal will be held to the theory on which the case was tried below.
3. **INSTRUCTIONS: Tests for Determining Correctness: Confusing Instructions.** The test of the correctness of instructions lies not in the close analysis which a critical lawyer, or an appellate court, with the aid of briefs and arguments, gives to them, but is how they will be understood by the average juror. When instructions are so involved as to cloud the real issue and to require careful and critical examination on the part of the trial and appellate court to determine their meaning or the inferences which may be drawn from them, the very object of giving instructions to the jury is defeated, and, in determining the sufficiency of a series of instructions, the question is, whether the jury were either misdirected or lacking in proper direction, or so directed as to necessarily confuse them in arriving at a correct solution of the issues.
4. ———: **Refusal: Abstract Instructions: Principal and Agent: Joint Agency.** In an action to secure one-half of certain commissions received by defendant for the sale of corporate stock, where plaintiff alleged that he and defendant had been jointly employed to sell said stock and had agreed to divide equally the compensation received therefor, and that the owner of the stock had paid plaintiff one-half of the amount of the agreed compensation, an instruction offered by plaintiff, declaring that if one of two persons jointly engaged in the performance of certain work has received the full compensation paid for the services, the law does not permit him to say that he intended to deceive his co-worker by making a secret agreement by which he alone should receive compensation, but in

such case the law treats all such secret action as inuring to the benefit of both parties, and requires that the money received, in the absence of any agreement or understanding to the contrary between the parties, shall be equally divided between them, was properly refused as being a mere abstraction and as not stating the facts hypothetically and applying the abstract propositions of law to such facts.

5. **PRINCIPAL AND AGENT: Joint Agency: Instructions: Refusal: Abstract and Confusing Instructions.** In an action to secure one-half of certain commissions received by defendant for the sale of corporate stock, where plaintiff alleged that he and defendant had been jointly employed to sell said stock and had agreed to divide equally the compensation received therefor, and that the owner of the stock had paid plaintiff one-half of the amount of the agreed compensation, the court refused to give an instruction offered by plaintiff, declaring that if the jury believed plaintiff and defendant were the owner's agent through whom the sale was made, then by legal implication, in the absence of distinct proof of separate agency, the authority conferred upon and rights acquired by the agents were presumed to be joint, and such joint agency, if the jury find it existed, operated to confer upon them joint rights and interests in the transaction and all profits resulting from it, and, in the absence of a distinct agreement for a different allotment, the interest of each was equal; that the law exacted from the agents the highest degree of good faith toward their principal and in their dealings with each other, and would not allow one of them, after receiving the entire compensation paid by the common principal for their services, to appropriate the whole amount and exclude his associate from any participation, under color of a separate understanding had with the common principal during the existence of such joint agency. *Held*, that the really material part of said refused instruction was correctly covered by an instruction given; that said refused instruction deals too much in generalities to bring it within the comprehension of an ordinary juror; that it would have tended to confuse the jury; that it fails to apply the principles of law announced to the facts of the case; that it assumes there was a joint employment of the agents, when this was the very fact in controversy in the case, without stating the facts necessary to constitute the employment a joint one; and that it injected the question of fraud into the case, without any foundation therefor in the petition; and hence the refusal of said instruction was proper.
6. **CONTRACTS: Joint and Several: Statute.** By the express provisions of section 2769, Revised Statutes 1909, all contracts which, by the common law, are joint only, shall be construed to be joint and several.

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow*, Judge.

AFFIRMED.

O'Neill Ryan for appellant.

The points relied upon for reversal are: First: That the verdict is against the law and the evidence and the weight of the evidence and should have been for plaintiff. Second: That the court erred in giving and refusing instructions, and the instructions given are conflicting and misleading, and in plain disregard of the opinion of the court on the second appeal (125 Mo. App. 47) and on the first appeal (108 Mo. App. 353). Third: Because the evidence showed that plaintiff and defendant were joint agents of Mullikin, and the court erred in not so instructing and in instructing to the contrary.

Jones, Jones, Hocker & Davis and *H. Chouteau Dyer*, for respondent, filed argument.

REYNOLDS, P. J.—This is the third time that this case has been before this court, the first on appeal by plaintiff, the second on appeal of defendant from an order setting aside a verdict in his favor. [See *Knapp v. Hanley*, 108 Mo. App. 353, 83 S. W. 1005; *Knapp v. Hanley*, 125 Mo. App. 47, 102 S. W. 670.] The facts in the case are so fully set out in these reports and are practically as now before us, that we do not consider it necessary to repeat them. There was again a verdict for the defendant, from which the plaintiff has duly perfected an appeal to this court.

The learned counsel for the appellant makes three points upon which he relies for reversal of the present judgment: First, that the verdict is against the law and the evidence and the weight of evidence and should have been for the plaintiff.

We dispose of this point by saying that it has been decided in cases without number, both by our Supreme Court and the Appellate Courts, that the question of the weight of evidence is for the determination of the trial court and the Appellate Courts will not disturb its conclusion on that evidence unless the verdict is so grossly contrary to the evidence as to demand our interference in the interests of justice, or is entirely unsupported by any evidence of a substantial and probative character. The very frank counsel for appellant concedes this, but urges that the case falls within the first rule. We cannot agree with him. Nor can we say that the verdict is against the law, as that law was given to the jury in the instructions of the court. The verdict is responsive to the issues presented by those instructions. Whether the instructions are correct will be disposed of later when we come to consider the instructions.

The second error assigned is to the action of the court in giving and refusing instructions, and that the instructions are conflicting and misleading and in plain disregard of the opinion of this court as announced when the case was here on the two former appeals.

Taking up the proposition which goes to the instructions given, we cannot agree with the learned counsel for the appellant in his criticisms as to the correctness of those given. Nor do we think that the instructions given are conflicting, or misleading, or in plain disregard of the opinions of this court as announced when the case was here on the two former appeals, as claimed by counsel.

This case seems to us to lie within a very narrow compass. The amended petition of the plaintiff, upon

which this case was last tried, appears to be practically the same as the petition summarized when the case was here before. The defense is now, as then, a general denial. While it is true that it sometimes occurs that parties try their causes on theories that are not altogether in line with the pleadings, and that when that occurs the appellate court holds them to the same theory here as that upon which the case was tried below, no such condition is presented here. The case was tried on the issue tendered by this amended petition and accepted by the general denial. They involved these propositions: First, did Mullikin, the owner of the number of shares of stock involved, on or about the day named, make an agreement with the plaintiff and defendant, wherein and whereby Mullikin agreed that plaintiff and defendant, in consideration of services then being and to be by them rendered for him and in his behalf, in and about the proposed sale of the stock, to pay them for their services one-half of whatever he should realize or receive upon the sale of the stock, over and above the price and sum of \$800 per share? In this is involved also the question of the nature of the employment—to place it correctly, was it of such a character as to constitute it a joint employment, the creation of a joint agency? Second, did the plaintiff and the defendant then and there agree to perform those services and to divide equally between themselves all such compensation as Mullikin should pay them therefor? Third, did plaintiff and defendant render the services as aforesaid for Mullikin, resulting in the sale of the stock at the price and sum of \$900 per share? On this latter proposition, that is, the sale of the stock at \$900 per share, there is no controversy. It was sold, as admitted by all parties, at that figure, being \$100 per share more than the \$800 which Mullikin demanded as the amount to be realized by him personally on the sale. There is no question over the further fact that upon the consummation of the sale at that figure, Mulli-

kin paid and turned over to defendant Hanley \$50 a share, that is \$5350, the one-half of the \$100 realized over and above the \$800. There is no question as to the demand and refusal to pay as between plaintiff and defendant, so that the point in issue turned on the answers the jury might give to the above propositions, and in order to a correct answer by the jury, that is to say, an answer which the trial court and this court will accept as conclusive on these questions, it was, of course, necessary that the instructions which the court gave were correctly framed. The test of correctness of instructions lies not in the indulgence of that close analysis which the lawyer in the seclusion of his office and with the aid of his books, and the trial or appellate courts, with the benefit of briefs and arguments of learned counsel before them, give to the instructions, but as to how those instructions will naturally be understood by the average men who compose our juries, on whose judgment on the facts the courts must act. When instructions are so involved as to cloud the real issue and require careful, critical examination on the part of the trial and of the appellate courts to determine exactly what they mean, or to determine what inference can be drawn from them, the very object of instructing a jury is defeated. The question is whether the jury was either misdirected or lacking in proper direction or so directed as to necessarily confuse them in arriving at a correct solution of these propositions. Tested by this rule we think that examination of the instructions given demonstrates that they are substantially correct, and do not conflict. The court, at the instance of plaintiff, by its first instruction, charged the jury, in substance, that if they believed that at the request of and by the authority of Charles Mullikin, plaintiff and defendant rendered services for Mullikin in and about the sale of the stock mentioned in the petition, and that it was understood between them at the time, that the compensation to be paid by Mullikin

therefor, if any, should be paid to plaintiff and defendant "jointly, that is, to both of them, and not that he should settle with or compensate them each separately;" and that the defendant received the whole of the compensation and paid no part thereof to the plaintiff, the jury should find for plaintiff; "and as to whether or not there was such an understanding between the parties, is for the jury to say under all the facts and circumstances in evidence in the case." The jury were further told by this instruction that if the plaintiff and defendant rendered such services and there was such an understanding at the time, then that constitutes the agreement alleged in the petition and it is not necessary, if such agreement was made, that it should have been in writing or in express words but may be inferred from all the facts and circumstances in the case, which it is for the jury to consider. The jury were further told in this first instruction that if they found and believed from the evidence that the services were rendered by plaintiff and defendant and rendered with the understanding or agreement above referred to, and that the whole compensation was paid by Mullikin to the defendant, for defendant and plaintiff, and was so received, the jury were instructed that in the absence of any understanding to the contrary, they are to presume that it was the intention of plaintiff and defendant at the time that the compensation was to be equally divided between them.

The second instruction, given at the instance of the plaintiff, told the jury that in order to establish the agreement as to the performance of the services and the equal division between themselves of compensation received, quoting the language of the petition on this point, it was not necessary that plaintiff should prove that the agreement was in words actually expressed between plaintiff and defendant, but it is sufficient for the jury to find and believe from the facts and circumstances in evidence that the parties acted and

conducted themselves toward one another in the carrying out of the matter in such a way as to lead each other to believe that they so intended at the time.

The third instruction, given at the instance of plaintiff, told the jury that in determining whether Mullikin employed plaintiff and defendant jointly to attend to the sale of the stock, they would consider all the facts and circumstances in evidence in the case as to whether the parties so intended at the time: that is to say, whether they by word or act gave each other so to understand; and if, from all the facts and circumstances in the case, Mullikin, Knapp and Hanley did give each other by word or act to so understand, and plaintiff and defendant so attended to the sale and rendered such services to Mullikin concerning it, and defendant received the whole compensation therefor from Mullikin and has not paid plaintiff any part of it, the jury should find for plaintiff.

The fourth instruction for plaintiff told the jury that if they found in favor of plaintiff they should find for \$2675, with interest at 6 per cent from the date of the demand, if they found a demand had been made before the bringing of the suit, and if no demand had been made before the bringing of the suit, then interest was to be allowed from the date of the institution of the suit, giving the date.

At the instance of the defendant, the court instructed the jury that if they found there was no express agreement and no implied agreement existing, defining correctly what was meant by these terms, whereby the defendant agreed to divide with plaintiff any amount he (defendant) might receive from Mullikin on account of the sale of Mullikin's stock, entered into or existing between plaintiff and defendant before the sale of the stock was consummated, then any promise or agreement the jury might find or believe to have been made by defendant with plaintiff after the consummation of the sale of the stock, for the payment of any sum

of money by defendant to plaintiff before and on account of the sale of the stock, is not binding on defendant.

The second instruction given at the instance of defendant told the jury that before plaintiff could recover, the jury must find and believe from the preponderance or greater weight of evidence that in the sale of the stock referred to, plaintiff and defendant acted in conjunction; that the defendant received the sum of money mentioned from Mullikin and that it was understood between Mullikin and defendant that that sum was paid defendant as compensation for the services of both plaintiff and defendant in and about the sale at the time Mullikin paid defendant, and unless they so found, plaintiff could not recover.

The third instruction given at the instance of defendant told the jury that before plaintiff could recover he must establish by the preponderance or greater weight of testimony that Mullikin employed plaintiff and defendant to act jointly as his agents in and about the sale of the stock and to pay them one-half of all realized over and above \$800 per share, and that it was understood and agreed between plaintiff and defendant, prior to the sale of the stock, that they should divide the one-half of that excess between themselves, and unless plaintiff has proven this he cannot recover.

The fourth instruction for defendant told the jury that if they found that neither Mullikin nor Hanley, at the time Mullikin agreed to pay one-half of all he received over \$800 per share, if he so agreed, understood, or contemplated, or intended that such payment should inure in part to the benefit of plaintiff, or that it should include plaintiff's compensation, then there was no implied agreement that plaintiff should receive any part of it, and he is not entitled to recover.

The fifth instruction given at the instance of defendant, told the jury that the mere fact that plaintiff

and defendant may have acted jointly in and about the work of selling the stock is not conclusive evidence of the fact that they were acting under a joint employment; that it was for the jury to say, in the light of all the circumstances in evidence and the conduct of the parties at the time, whether they were acting under a joint employment or a several and individual employment, and if the jury should find from the circumstances and conduct of the parties that they were acting under a several and individual employment and not a joint one, there was no implied agreement on the part of the defendant to divide what he received with the plaintiff.

Taking up the instructions asked by plaintiff and refused, it is urged that the second should have been given as "unquestionably," there was "secret action" by defendant in treating with Mullikin and on that alone, counsel says, seemingly, defendant claims now to keep all the principal paid, and undoubtedly paid, believing he was paying all that both agents should receive. Hence it is argued that the plaintiff was entitled to have the jury told that if they were acting jointly, one of them could not be deprived of his rights by any secret action of the other in dealing with their principal.

The second refused instruction reads:

"The court instructs the jury that if one of two persons who have been engaged jointly upon the performance of certain work which has been performed by them has received the full compensation paid for the services, the law does not permit him to say that he intended to deceive his co-worker by making a secret agreement by which he alone should receive compensation, but in such case the law treats all such secret action as inuring to the benefit of both parties, and requires that the money received, in the absence of any agreement or understanding to the contrary between the parties, shall be equally divided between them."

That is all of this instruction.

When this case was last before this court, Judge BLAND, who delivered the opinion for this court, distinctly suggested (125 Mo. App., supra, l. c. 56), that on a retrial of the cause, the instructions then under consideration should be so amended "as to omit mere abstract propositions of law and declare the law upon the facts hypothetically stated." The instruction is in entire disregard of this cautionary suggestion of the learned judge and is even more subject to condemnation for its generality than were the instructions referred to by him. Those generalities referred to and condemned did not stand by themselves, as in the case at bar, but were embodied in and made part of an instruction which, in a measure, at least, undertook to hypothetically state the facts. It will be observed that the instruction under consideration stands alone, without any facts hypothetically stated to connect the generalities with the facts in evidence. It was correctly refused as a mere abstraction, a form of instruction so often condemned by our appellate courts that it is useless to collate the cases in which the rule has been announced. The criticism as to the first refused instruction applies also in a measure to this.

The plaintiff asked the court to give an instruction, designated as "plaintiff's first refused instruction," which was to the effect, that if the jury found from the evidence that plaintiff and defendant were Mullikin's agents, through and by whom the sale of his stock was made, then the jury are instructed that by legal implication, in the absence of proof of distinct, separate agency, the authority conferred and rights acquired by the agents are presumed to be joint and such joint agency, if the jury find that it existed, operated to confer joint rights and establish a joint interest in the parties hereto in the transaction, and all profits resulting therefrom, and in the absence of distinct agreement of a different allotment, the interests of each were

the same and equal, and the law exacted from the agents the highest degree of good faith, not only toward their principals, but also in all other dealings with each other, and implied an equal division of the compensation paid for their joint services, and the law does not allow one of them, after receiving the entire compensation paid by the common principal for their services to appropriate the whole amount and exclude his associate of any participation by virtue and under color of a separate understanding had with the common principal during the existence of such joint agency and affecting the subject and purpose of the joint agency.

It is argued that this instruction covered a correct and vital declaration of law, being to the effect that if the parties were Mullikin's agents for the sale of the stock, then the law implied, in the absence of proof of separate agency, that this agency was joint and that all profits, there being no agreement as to their allotment, should be shared equally and one could not receive and keep the entire compensation. This, it is urged, correctly declares the law as announced by this court on the first appeal, and it is argued that no instruction given distinctly covered that theory; hence it is argued that its refusal is reversible error.

It may be said that the really material part of this instruction, relating to joint agency, is correctly covered by plaintiff's first instruction, which was given. This refused instruction deals entirely too much in generalities to bring it within the comprehension of an ordinary juror; it lacks the essential element of all instructions, of fitting the principles of law announced into the facts in the case; its tendency was to confuse the jury; it is of a character to require close attention and analysis even by one trained to the consideration of legal propositions and with the ability to apply them to the facts which may have been in evidence in the case. It announces, in one clause, that by legal implication and in the absence of proof of distinct, sep-

arate agency, the authority conferred and rights acquired by agents are presumed to be joint and the agency a joint agency. In another clause it tells the jury that if they find and believe from the evidence that a joint agency existed, it operated to confer joint rights and establish a joint interest in the parties thereto in the transaction, etc. This of itself had a tendency to confuse and mislead the jury. The very point in issue in this case turns on the facts involved in the employment of plaintiff and defendant. These facts were for the jury to determine. The tendency of the one clause of this instruction is to lead the jury to infer that if Mullikin made a contract with both of the parties plaintiff and defendant, the law implied that it was a joint contract. While abstractly that may be correct, it is correct only on consideration of the particular facts and circumstances of a given case. The employment of plaintiff by Mullikin might have been entirely distinct and separate from the employment of the defendant, even if both of them were employed to carry on the same transaction, and this fact as to this matter of employment was for the jury. We do not think that what was said by this court, when this case was here before, as reported 108 Mo. App. 1. c. 361, is to be held as taking the issue of fact from the jury. It is true that it is there said that the fact of a joint employment and undertaking was established by such undisputed evidence as warranted the court, as a reviewing court, in so holding. The very authorities cited by the court in support of this qualifies the broad statement. Thus the court cites 1 Parsons on Contracts, p. 11; 1 Beach, Contracts, sec. 668; Mechem, Agency, sec. 106. It is true that at the point of citation, Prof. Parsons does say that "wherever an obligation is undertaken by two or more, or a right given to two or more, it is the general presumption of law that it is a joint obligation or right. Words of express joinder are not necessary for this purpose; but on the other hand, there should be words

of severance, in order to produce a several responsibility or a several right." On the following page, however (p. 12), the same author says: "Whether the liability incurred is joint, or several, or such that it is either joint or several at the election of the other contracting party, depends (the rule above stated being kept in view) upon the terms of the contract, if they are express; and where they are not express, upon the intention of the parties as gathered from all the circumstances of the case. It may be doubted, however, whether anything less than express words can raise a liability which shall be at once a joint and a several liability." Further along the same learned author says (p. *21): "Parties are not said to be joint in law, merely because they are connected together in some obligation or some interest which is common to them both. They must be so connected as to be in some measure identified." Mechem and Beach are practically to this same effect. The latter, at section 668, treating of the subject of joint contracts, says: "Where an obligation is undertaken by two or more persons, or a right is given to two or more, the general legal presumption is that it is a joint obligation, or a joint right as the case may require. Where the subject-matter of the contract is entire, as where the contract is to pay an entire sum to several persons, it is solely a joint contract." It is to be borne in mind that in the case at bar the very heart of the controversy is, whether Mullikin was to pay the entire sum to Hanley alone or to Hanley and Knapp. At section 671, Beach says: "Where the language is ambiguous, the contract shall be taken to be joint or several, according to the interest of the parties and the nature of the cause of action." At section 672, he says: "Whether the contract is joint or several, or joint and several, is one of intention. The contract must be considered as a whole, and if, upon such consideration, the intention of the parties becomes apparent, it must prevail over the literal interpreta-

tion of detached words, phrases and clauses." At section 688 Beach says that joint contracts, or contracts which would be joint by the common law, are in many states required to be construed as joint and several. That is the law in this state as provided by section 2769, Revised Statutes 1909, which reads as follows: "All contracts which, by the common law, are joint only, shall be construed to be joint and several." Mr. Mechem, in his work on the Law of Agency (Ed. 1889), sections 104, 105, 106, distinctly lays down the proposition that "whether a certain writing creates an agency or not, and if so, what is the nature and extent of the power conferred, the writing being produced, are questions of law for the decision of the court, and so where the facts are undisputed, the court must determine whether they create an agency, and if so with what powers and limitations, and this is equally true whether it is sought to establish the agency by previous authorization or by subsequent ratification. Where, however," says Mr. Mechem, "the authority was not conferred by written instrument and the facts are in dispute, it is for the jury to determine under proper instructions from the court, not only whether an agency exists, but, if so, what is its nature and extent. It is impossible to lay down any inflexible rule by which it can be determined what evidence shall be sufficient to establish an agency in any given case." These are the authorities referred to in the opinion of this court, when the case was here before, and we think that the conclusion to be derived from them, accepting them as correct expositions of the law, would not have sustained the trial court in declaring as a matter of law, that the evidence in the case disclosed a joint employment and undertaking. To have so instructed would have assumed every fact connected with the employment and undertaking as establishing a joint agency, and this was not for the court and would have been error, in the light of the testimony.

The very fact in controversy in this case was whether there was a joint employment. It would have been error, in the face of the conflicting evidence over this fact, for the court to have instructed that it was a joint employment, without instructing the jury as to the facts necessary to constitute the employment a joint one. In the first instruction given at the instance of the plaintiff, the court did this, in defining a joint agency. In this refused instruction, it did not. Another error in this refused instruction No. 1 injects the question of fraud into the case which is utterly without any support or foundation upon which to rest by any allegations in the petition. It is nowhere intimated in the petition or amended petition upon which the case was tried that there was any fraud or concealment in the transaction whatever, and if the facts as stated in this refused instruction No. 1 were in evidence or are in the case, then an element of fraud was injected into it which is not supported by the pleadings.

This practically disposes of the third contention of the learned counsel for the appellant, that the evidence showed that plaintiff and defendant were joint agents of Mullikin. We cannot assume to say with all the facts in dispute as to the creation of the agency, that they established a joint agency, unless we assume that the facts concerning that agency as testified by one side are true and those testified to by the other side are not true. This is not the function of the court but was for the jury.

We think upon the whole that the case was properly submitted to the jury; that the instructions in this case as given fairly and clearly presented the real issues in this case, so that they were within the comprehension of any ordinary jury. In this particular case two juries, selected and accepted by the parties, have passed upon the facts, both juries arriving at the same conclusion on them. We see no reason to disturb that

verdict, and no reversible error. The judgment of the circuit court is affirmed. *Nortoni, J., and Caulfield, J., concur.*

**BONET CONSTRUCTION COMPANY, Appellant, v.
CENTRAL AMUSEMENT COMPANY, Defendant,
EDWARD WESTEN AND WILLIAM L. KLINE, Respondents.**

St. Louis Court of Appeals, Submitted on Briefs October 4, 1910.
Opinion Filed November 29, 1910.

1. **APPELLATE PRACTICE: Abstracts: Compliance with Rules: Waiver.** The court may, if it sees proper, not only waive non-compliance with Rule 33, which requires respondent, if he desires to question the sufficiency of appellant's abstract, to file his objections thereto in writing in the office of the clerk, within ten days after a copy of the abstract has been served upon him, but the court may, of its own motion, notice and take up any defect in the abstract which is material to the proper disposition of the cause, and may even disregard the entire abstract, if it utterly fails to comply with the statutes or established practice of this court and the Supreme Court.
2. **———: ———: Defective Abstract.** Where it is impossible to determine from an inspection of the abstract what are matters of record proper and what are matters of exception, the court may, in its discretion, dismiss the appeal or affirm the judgment.
3. **CORPORATIONS: Stockholder's Liability: Motion for Execution: Statute.** A proceeding by motion for execution against a stockholder of a corporation, under section 3004, Revised Statutes 1909, is a summary proceeding and a statutory substitute for a bill in equity; the statute contemplating a hearing and determination of the motion by the court without a jury, as in a suit in equity, and the cause on appeal being subject to review in the same manner as cases in equity.
4. **APPELLATE PRACTICE: Presumption that Judgment is Correct: Burden on Appellant to Overthrow.** The court, on appeal, will presume that a judgment for defendant is correct as to all the issues, and it devolves on plaintiff appealing therefrom to show that it is not correct.

5. ———: **Equity Case: Findings Not Conclusive.** The court, on appeal in an equity case, is not bound by the findings of the chancellor either as to ultimate facts or conclusions of law, though it will defer in a great measure to his findings and judgment.
6. ———: **Abstract: Must Embody all the Evidence.** In a proceeding by motion for execution against a stockholder of a corporation, under section 3004, Revised Statutes 1909, while, on appeal, it is not necessary, under Rule 9, requiring the embodying in the bill of exceptions of all the evidence in equity cases, to set out in the abstract the questions and answers, it is necessary that the abstract contain substantially all of the evidence offered and produced in the trial court, and an abstract in such a case which merely presents an imperfect synopsis of or detached questions from the evidence is insufficient to permit the appellate court to review the sufficiency of the evidence to sustain the findings.
7. **CORPORATIONS: Stockholder's Liability: Motion for Execution: Estoppel.** In a proceeding by motion for execution against a stockholder of a corporation, under section 3004, Revised Statutes 1909, where the evidence tended to show that a concession taken as part payment of the capital stock was not over-valued, and that the creditor, at the time he entered into the contract with the corporation, had knowledge of its financial condition and of the manner in which its stock had been sold, paid for and issued, he was estopped from asserting any liability against stockholders on account of any unpaid part of their subscription.
8. ———: ———: ———: **Fully Paid Stock.** A creditor of a corporation may not enforce liability against a stockholder who purchased in the open market stock represented on its face to be fully paid without any knowledge on his part of any facts which would put him on inquiry that the representation was not true.

Appeal from St. Louis City Circuit Court.—*Hon. Moses N. Sale*, Judge.

AFFIRMED.

H. Chouteau Dyer for appellant.

(1) The failure on the part of the defendants to sign the subscription paper for the increase of the capital stock of the Central Amusement Co. will not pre-

clude their being considered subscribers. *Shickle v. Watts*, 94 Mo. 419; *Hotel Co. v. Wright*, 73 Mo. App. 240; *Pittsburgh v. Spooner*, 74 Wis. 307; *Bank v. Talbott*, 131 Col. 45; *Bank v. Adams*, 72 S. W. (Ky.) 1125; *Bates v. Tel. Co.*, 134 Ill. 536. (2) The purchase of stock direct from the company will constitute the purchasers liable for unpaid balances. *Shickle v. Watts*, 94 Mo. 419; *Webster v. Upton*, 91 U. S. 65; *Chouteau v. Dean*, 7 Mo. App. 215; *Morawitz Corp* (2 Ed.), sec. 69. (3) The stock owned by the defendants was not paid in full. *Van Cleave v. Berkey*, 143 Mo. 133; *Camden v. Stewart*, 144 U. S. 104. The statement on the face of the certificate that it was full paid is not conclusive against a creditor. *Wight Co. v. Steinkemeyer*, 6 Mo. App. 575. (4) Knowledge of the manner and amount of payment on capital stock by one seeking to enforce payment of balances due must be complete in order to avail as a defense. *Berry v. Rood*, 168 Mo. 316; *Lea v. Iron Co.*, 119 Ala. 271. (5) The defendant stockholders are liable for the unpaid balances on their stock. *Rumsey Mfg. Co. v. Kaime*, 173 Mo. 550.

Marion C. Early for respondents.

(1) If the whole of the evidence is not brought up on appeal the judgment is presumed to be correct as to all issues in the case, and it devolves upon appellant to show that it is not correct. *Guinan v. Donnell*, 201 Mo. 173; *Pitts v. Pitts*, 201 Mo. 356; *Hubbard v. Slavens*, 218 Mo. 598; *Haggard v. Walker*, 132 Mo. App. 463; *Harrison v. Pounds*, 190 Mo. 249. (2) When no declarations of law are asked it will be presumed that on whatever issue there was a conflict of evidence, the finding of fact was in favor of the party who prevailed and every reasonable intendment or inference to be drawn from the evidence in support of the trial court must be adopted. *Home Building Co. v. Grocery Co.*, 82 Mo. App. 245; *Barbee v. Crawford*, 132 Mo. App. 1;

Baxter v. Hermann, 134 Mo. App. 260; **Bond & Stock Co. v. Hauck**, 213 Mo. 416. (3) When the court refuses a declaration of law that the plaintiff is not entitled to recover, but finds for defendant, this ruling indicates that the court believed a *prima facie* case had been made, but drew from the evidence some inference of fact against the *prima facie* case, and on such inference determined the issues in favor of the defendant. **International Text Book Co. v. Yount**, 129 Mo. App. 247. (4) The property transferred to the Central Amusement Company in part payment of its capital stock was shown by the evidence to have been taken by the Central Amusement Company at its reasonable and fair cash valuation, and at a less value than that placed upon it by the officers of the appellant. There being substantial evidence to support the finding it is conclusive. **Vogeler v. Punch**, 205 Mo. 558; **Berry v. Rood**, 168 Mo. 316. (5) When persons extend credit to a corporation, and having been closely identified with the transaction and knowing the stock was not full paid, they are estopped to assert any liability on such unpaid subscriptions. **Meyer v. Ruby Trust M. & M. Co.**, 192 Mo. 162; **Blake v. Meadows**, 225 Mo. 30. (6) A person who buys stock on the open market represented upon its face to be full paid and non-assessable, without knowledge that it has not been fully paid as required by law is not liable for any unpaid part thereof. **Euston v. Edgar**, 207 Mo. 287.

REYNOLDS, P. J.—The plaintiff in this case, appellant here, about the 22d of August, 1903, entered into a contract with the Central Amusement Company to erect certain buildings and improvements on a concession connected with the Louisiana Purchase Exposition, which concession had been granted to the Central Amusement Company by the Exposition Company. In November, 1904, plaintiff commenced action against the Central Amusement Company to recover a balance

claimed to be due on account of the making of these improvements under the contract, and in December, 1907, recovered a judgment against the Central Amusement Company for \$3562.70 and costs. Execution issuing on this judgment in the April term, 1908, of the circuit court, returnable to the June term thereof of that year, was at that term returned *nulla bona*, whereupon plaintiff filed a motion for execution against Edward Westen and William L. Kline, hereafter referred to as the defendants, claiming that they were stockholders in the Central Amusement Company on the 1st of June, 1908, each being the owner of about three hundred shares of the capital stock of the Central Amusement Company, of the par value of one hundred dollars a share and "that about forty per centum of the par value of said stock remains unpaid." Written notice of the intention to file the motion was duly given. Defendants answered separately but the defenses set up in their answers are practically identical. After a general denial of the matters except as thereafter specially admitted, the answers admit that each of the defendants became owners and holders of certain shares of stock in the Central Amusement Company, which stock, it is averred, they purchased or agreed to purchase in the summer of 1903, for value upon the open market, for \$22,500 each, which sum they aver they had respectively paid, and that they had no knowledge as to the organization of the Central Amusement Company nor were in any manner parties thereto; that the stock which they purchased was represented upon its face to be full paid and non-assessable and that they had purchased the same upon that representation. As a further defense the defendant set up that the Bonet Construction Company, hereafter referred to as the plaintiff, its officers and agents, were at all times entirely familiar with the whole plan, scheme and organization of the Central Amusement Company, from the date of its inception, and were advised and had full knowledge

of the manner by and consideration on which the capital stock of that company had been subscribed and paid for and were fully advised and aware of the value of said consideration, and that at the time of entering into the contract between plaintiff and the Central Amusement Company and at the time of extending all credits upon which the judgment in favor of plaintiff was rendered against that company, the plaintiff, its officers and agents were fully aware of the facts, and whatever credits plaintiff extended to that company were extended to it with the full knowledge of the consideration, manner and means by which its capital stock had been subscribed and paid for and they aver that plaintiff is estopped from asserting or pretending that the stock was not fully paid for or from in any manner challenging the consideration for which the stock was issued. As a further defense each of the defendants sets up that in the month of February, 1904, at the request of the officers of the Central Amusement Company, he had become guarantor of that company upon promissory notes payable to and held by a bank in St. Louis, in the aggregate sum of \$20,000, on which each of them had paid \$8000, which had never been repaid, and that the Central Amusement Company is therefore indebted to each of them in that sum, each of them pleading the payment as an offset against any liability upon any claim for unpaid stock which either of them may have at any time held or owned in the Central Amusement Company.

A general denial by way of reply was filed to these answers.

At a trial of the case before the court, defendants, at the conclusion of plaintiff's evidence in chief, demurred to it. The demurrer was overruled and after defendants had introduced their testimony and plaintiff had introduced rebutting testimony, the court denied the motion for execution. Plaintiff excepted to this ruling, filing its motion for new trial, and that

being overruled, saved exceptions and in due time perfected an appeal to this court.

Rule 33 of our court provides that if the respondent wishes to question the sufficiency of the appellant's abstract of the record, he shall file his objections in writing in the office of the clerk of the court within ten days after a copy of the abstract of the record has been served upon him, and shall distinctly specify the supposed defects and insufficiencies of the abstract, serving the appellant with a copy of the objections on or before the day they are filed with the clerk, and that if the respondent omits to file written objections to the appellant's abstract within that time, so that the court may pass upon them before the appeal is submitted for decision, this court will, if it deems it proper, disregard any objections to said abstract thereafter made by the respondent. Counsel for respondents has not followed this rule, but in his statement and brief calls attention to the fact that the appellant has not brought before the court the whole of the record of the trial court and that because of some inaccuracies in that which has been inserted in the partial abstract filed by appellant, he sets out verbatim certain portions of the omitted parts with a view to correcting such errors. We can, under Rule 33, if we see proper, not only waive compliance with that rule, but of our own motion, take up and notice any defects in the abstracts filed, which in our judgment are material to the proper disposition of cases. We can even disregard the whole of the abstract furnished by the appellant's counsel, if that abstract utterly fails to comply with the statutes or with the established practice of this court as well as of the Supreme Court concerning abstracts. It is impossible from an inspection of the abstract before us to determine what are matters of record proper and what are matters of exception, so that we might dispose of the case by either affirming the action of the circuit court or dismissing the appeal on the ground that the appel-

lant has failed to comply with the rules of this court in that respect. We have concluded, however, not to do that but to dispose of this case on another proposition.

Rule 9 of this court requires, in substance, that in cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence, where there is no dispute as to the admissibility or legal effect thereof, and provided further, that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form, where this can be done and at the same time preserve the full force and effect of the evidence. Rule 12 of our court provides that in cases where the appellant shall have, under the provisions of section 813, Revised Statutes 1899, now section 2048, Revised Statutes 1909, filed in this court a copy of the judgment, order or decree in lieu of the complete transcript, he shall make, deliver and file an abstract of the record; and Rule 15 of our court provides, among other things, that the abstract shall set forth so much of the record as is necessary for a full and complete understanding of all the questions presented to this court for decision; that the evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary for a complete understanding of the evidence, and in all cases the abstract shall set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

No formal assignment of error is made in this case. The brief, however, makes five propositions, which, acting with liberality, we may construe as assignments of error. The first is that the failure on the part of defendants to sign the subscription paper for the increase of the capital stock of the Central Amusement Company will not preclude them being considered subscribers. Second, that the purchase of stock direct from the company will constitute the purchasers liable for unpaid balances. Third,

that the stock owned by the defendants was not paid in full; that the statement on the face of the certificate, that it was full paid is not conclusive against a creditor. Fourth, that the knowledge of the manner and amount of payment on capital stock by one seeking to enforce payment of balances due must be complete in order to avail as a defense. Fifth, that the defendant stockholders are liable for the unpaid balances on their stock. It is very obvious that the determination of these questions must rest on a consideration of the evidence in the case. The proceeding by motion for execution against a stockholder, under what is now section 3004, Revised Statutes 1909, is a summary proceeding and a statutory substitute for a bill in equity, the statute contemplating a hearing and determination of the motion by the court without the intervention of a jury, the trial itself is practically as in a suit in equity and on appeal the case is subject to review in this court in the same manner as causes in equity. [Erskine v. Loewenstein, 82 Mo. 301, l. c. 305.] Our Supreme Court has laid down as the settled law of this state, that in case the judgment is for defendant, it is presumed to be correct as to all the issues and that it devolves upon plaintiff to show that it is not correct. It is further the established rule that while in equity cases the appellate court will defer in a great measure to the finding and judgment of the chancellor, yet it is not bound to do so either as to ultimate facts or conclusions of law. It has been uniformly held that in equity cases the whole of the evidence must be brought up on appeal. [State ex rel. v. Jarrott, 183 Mo. 204, l. c. 217, 81 S. W. 867; Guinan v. Donnell, 201 Mo. 173, 98 S. W. 478.] Our rule 9 above referred to does this, and it has been in force practically in its present wording almost from the organization of the court. The power to make such a rule is expressly given by section 2048, Revised Statutes 1909.

In *Pitts v. Pitts*, 201 Mo. 356; 100 S. W. 1047, Judge LAMM, disposing of the argument of counsel that on the facts found by the chancellor, the decree was for the wrong party, says that all the later decisions of our Supreme Court are to the effect that in an equity suit it is incumbent upon a litigant seeking relief from the appellate court to bring to it the evidence, so that the conscience of the court may be bound and it may seek equity and do it in the light of the testimony itself. He cites many cases to that effect and concludes that equity suits are to be heard *de novo* on appeal. "The eye of a chancellor," says Judge LAMM (l. c. 356), "must search the very marrow of the thing; and, in order to discern what is due the litigant, that eye must not be baffled by the screen of a mere finding of facts below—the question still remaining, were the facts as found the real facts or not?" In the case at bar we have no finding of fact, no declarations of law—nothing but the order or judgment denying the motion, and what bears on its face evidence of being an imperfect synopsis of or detached quotation from the evidence. Counsel may say he has given us all the material evidence. It is not for counsel to pick out what he deems material. This court is to determine that. Having in view the manner in which we, as an appellate court, are required to pass on suits in equity, when we are to review the finding of the trial judge, especially if we are asked to disturb or set aside that finding, we must have the case before us as nearly as possible as it was presented to him. Our Rule 9 requires the whole of the evidence to be embodied in the bill of exceptions. Of what avail is it to make this requirement as to bills of exception, if, when an abstract of that bill is brought into this court, it presents but a part of it, and sets that part out so that we cannot be sure that it has reproduced either in substance or effect the whole of the evidence, not necessarily verbatim, and, as provided by another rule, not necessarily by questions and answers, but beyond peradventure so

as to substantially set out all of the evidence offered and produced in the trial court. The abstract in this case at bar falls short of this and we must therefore conclude that the appellant, upon whom the burthen rests to do so, has failed to demonstrate error. So far as the evidence is preserved in the abstract, and we have read all of it in connection also with the corrections in it which are set out by the respondent in his statement, we have concluded that there is ample evidence in the case, as presented to us, to support the finding of the trial court. The evidence before us tends to show that the concession held by the Central Amusement Company and which was taken up as payment in part of the capital stock of the corporation was not taken at a fictitious or swollen valuation but at a fair price, and the court must have so found. There is evidence that the officers of the plaintiff company, at the time they entered into the contract with the Central Amusement Company, under which contract the debt which matured into the judgment was founded, had such knowledge of the financial condition of the Central Amusement Company and of the manner in which its stock had been sold and paid for and issued, as to estop them and their company from asserting any liability against these defendants on account of any unpaid part of their subscription, if there is such, for this stock. The trial court must have so found. Finding that, the conclusion reached in denying the motion is so far correct. [Berry v. Rood, 168 Mo. 316, l. c. 334, 67 S. W. 644; Colonial Trust Co. v. McMillan, 188 Mo. 547, l. c. 567, 87 S. W. 933.]

There is evidence tending to show that while this stock held by the defendant Westen was issued direct to him from the company when it increased its capital stock, in point of fact he purchased it for value from the defendant Kline and was to all intents and purposes a purchaser in the open market of stock represented on its face to be full paid, without any knowledge upon

his part or any facts which would put him on inquiry, that that was not the truth. The trial court was justified, on this evidence, in its finding, for in such case, as held by our Supreme Court in *Meyer v. Mining & Milling Co.*, supra, l. c. 189, the stockholder is not liable.

Without challenging the propositions advanced by the learned counsel for the appellant as being correct expositions of the law, we cannot find that they apply to the facts in this case, so far as we gather those facts from his own abstract. We thence conclude that in so far as we are able to judge of the evidence that was really before the trial court, that court was warranted in arriving at the conclusion that the defendants were not liable under the motion for contribution with respect to their several shares of stock. The judgment or order of the circuit court overruling the motion for execution is affirmed. *Norton, J.*, and *Caulfield, J.* concur.

FRED W. STEVENS, Respondent, v. KNIGHTS OF
THE MODERN MACCABEES, Appellant.

St. Louis Court of Appeals, Argued and Submitted November 10,
1910. Opinion Filed November 29, 1910.

1. **APPELLATE PRACTICE: Overruling Motion for New Trial: Sufficiency of Exception.** In order to permit a review on appeal of matters of exception, it is not necessary that there be both objection and exception to the action of the court in overruling the motion for a new trial, but it is sufficient if an exception to such action be duly saved, since such exception includes objection.
2. ———: **Exceptions to Instructions: Necessity of Objections.** The appellate court will not inquire into the correctness of an instruction given by the trial court of its own motion, in lieu of all instructions asked by the adverse party, unless the party complaining of the instruction objected to the giving of it before it was given, an exception to the instruction after it was given, without such objection, not being sufficient.

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3. **CONTRACTS: Employment: Fraternal Beneficiary Association: Authority of Officer: Ratification.** Where one employed by a fraternal order as organizer did not know of any want of authority on the part of the officer making the contract to make the duration of the contract extend beyond a designated date, and, in reliance on the terms of the contract, continued to perform the services after the designated date, and the governing body in charge of the affairs of the order either actually knew of the existence of the contract or had access to it as a part of the records of the order, and knew that the employee was performing the services in reliance on the contract, the order ratified the act of its officer in executing the contract, thereby entitling the employee to recover for the services rendered after the designated date.
4. **APPELLATE PRACTICE: Admission of Evidence: Sufficiency of Objection.** An objection to a question propounded, that it is immaterial, is not specific enough to challenge the ruling of the court admitting the evidence.
5. **CORPORATIONS: Contracts: Failure to Affix Seal.** That the seal of a corporation was not affixed to a contract made by it is not in itself fatal to the contract.

Appeal from St. Louis City Circuit Court.—*Hon. Hugo Muench, Judge.*

AFFIRMED.

Frank E. Jones, Wm. H. and Davis Biggs for appellant.

Earl M. Pirkey for respondent.

(1) When a motion for a new trial is overruled, the losing party must both object and except if he desires the action on the motion reviewed, and unless he both objects and excepts the action of the trial court will not be reviewed. *Williams v. City of St. Joseph*, 118 S. W. 1180. (2) Unless an instruction is objected to when offered, the action of the trial court in giving it will not be reviewed. Excepting to the action of the court is insufficient to secure a review of the action of the trial court. *Sheets v. Insurance Co.*, 226 Mo. 617;

State v. Miles, 199 Mo. 559; Carlisle v. The Keokuk and Packet Line Company, 82 Mo. 43; Gordon v. Gordon, 13 Mo. 215. (3) An objection to evidence that it is immaterial is no objection in law and will not be considered on appeal. State v. McKenzie, 128 S. W. 948. (4) Where an unauthorized act of an agent of a corporation is clearly beneficial to the corporation, a presumption of ratification will arise from very slight circumstances. Bank v. Bank, 107 Mo. 145; Bank v. Hughlett, 84 Mo. App. 273.

REYNOLDS, P. J.—Plaintiff brought this action against the defendant to recover salary claimed to be due and traveling expenses incurred under a contract said to have been entered into between him and the defendant order, of date February 8, 1907, and also under a second or separate count of the petition, for a like amount on account of the value of the same services rendered and expenses incurred, alleging them to have been of the reasonable value claimed. It is not necessary to notice this second count as plaintiff abandoned it and the recovery was had on the first count, based on the special contract. The reply was a general denial.

At a trial before the court and jury, among other testimony introduced was what was claimed to be the contract by which, in consideration of the services of plaintiff as general organizer of the order, he was to receive salary at the rate of \$2500 per annum, in monthly installments, together with all railroad fare, hotel bills and other legitimate expenses incurred when away from his place of residence on business connected with the order. It was further agreed in the contract, that it should take effect and be in force from and after the first day of January, 1907, up to January, 1908, "and unless otherwise ordered before the latter date up to and including the time of the meeting of the Great Camp, Knights of the Modern Maccabees, on the

second Wednesday of June, in the year 1908, unless same shall be terminated at an earlier date by common consent of both parties to this agreement." The contract was signed by the great commander of defendant order and by plaintiff. The attestation clause reads: "In witness whereof, we have hereto affixed our hands and seals this 8th day of February, 1907," but no seals, corporate or private appear. The signature, "A. M. Slay, Gt. R. K.," appears under the word "Witness," below and to the left of the signatures of the great commander of the order and that of plaintiff, and below this is the word, "Witness," and the signature, "Adah Armitage." Mr. Slay, it appears, was at the time the great record keeper or secretary of the order and Miss Armitage was then a stenographer in the office of the secretary.

The first count of the petition, on which the case was tried, is for the salary and traveling expenses claimed to be due under that part of the contract which is quoted, that is, for services for the months of February, March, April and May, and the first twelve days of June, 1908, the salary for January, 1908, it appears, having been paid. After testimony on the part of plaintiff to the effect that the great commander or chief executive officer of the order had entered into this contract with him and that subsequently, some time in February, 1908, there had been some steps taken by the executive committee of the order, looking to its rescission but that at the request and by direction of the great commander or president of the order, plaintiff had continued in its service down to the middle of June, 1908, denying the authority of the executive board to terminate the contract, defendant introduced evidence tending to prove lack of authority in the president to execute the contract and also of the termination of the contract February 6, 1908, by the executive committee, a resolution of discharge by that body on that date of plaintiff from his further service for the order being in evidence.

At the close of plaintiff's case in chief, defendant demurred to it. The demurrer was overruled, defendant excepting but afterwards going on with its testimony. There were a number of objections made to the admission and exclusion of testimony in the progress of the trial but as to most of the material testimony that was objected to, so far as the abstract of the record shows, the objection was on the ground of immateriality, and most of the exceptions that were saved on part of the defendant to the adverse rulings of the court were exceptions to overruling of objections for immateriality. This does not apply to the objection to the receipt of the contract in evidence. That was objected to "because it purports on its face to be in pursuance of a resolution of the executive committee, and it is not shown what that resolution is; further, on the ground that no authority is shown in the great commander of this order, to execute such a contract and bind the order, and because it is not executed under seal of the defendant corporation, as is required as to all contracts." The court overruled the objection, defendant at the time duly excepting.

At the conclusion of the evidence the plaintiff asked instructions which the court declined to give but of its own motion gave one which covers the case as fully as necessary to give an intelligent idea of what was involved in it as well as of the facts. The entry concerning this instruction, as appears by the abstract prepared by defendant's counsel, reads thus: "Whereupon the plaintiff prayed the court to give the jury certain instructions, which instructions the court refused to give, and of its own motion gave the following instructions to the jury." The instruction follows: In substance, the first part of it told the jury that if they found from the evidence that the written contract, dated February 8, 1907, was signed in behalf of the defendant by its great commander or chief executive officer and witnessed by its great record keeper or secretary and by them delivered to and signed by plaintiff; that a duplicate copy

of it was at or about the same time delivered to the great commander of the defendant and by him placed and kept among the records and office documents of defendant, and if they found from the evidence that the great commander had, with the knowledge and consent of the managing committee or body of the defendant, entered into other similar contracts of employment with plaintiff, and if they found from the evidence that the plaintiff, at the time of signing or receiving the written contract, was not informed and did not know of any want of authority on the part of the great commander to make the duration of the contract of employment extend beyond the 31st of December, 1907, provided the jury found that there was such want of authority, and if they further found that plaintiff, in reliance upon the terms of the contract, continued to perform such services for the defendant as were called for by the contract after the 31st of December, 1907, and that the governing body in charge of defendant's affairs, namely, its executive committee, either actually then knew of the existence of the contract or had access to the same as part of the records of the defendant, and knew that plaintiff was performing the services in reliance upon the contract, then the jury may form such facts, if they find them to be facts, conclude that the defendant had ratified and accepted the act of its great commander in executing the contract sued on, and if the jury find such ratification and acceptance to have taken place, their verdict should be for the plaintiff at the rate of \$208.33 a month for such time not later than June 12th as they may find plaintiff to have continued to render services to the defendant of the kind specified in the contract from and after February 1, 1908, and the jury were further authorized to find in favor of plaintiff for such an amount of railroad fare, hotel bills, etc., as they might find and believe from the evidence that during the continuance of the contract plaintiff had necessarily expended, not exceeding \$21.78 (the amount stated in the first count

of the petition), and could allow interest on the total amount from the 13th of June, 1908, at the rate of five per cent.

In addition to this the court gave the usual instruction as to the number of jurors necessary to concur in the verdict. It should be said in passing that the interest rate was fixed at 5 per cent, as at the outset of the trial it was agreed by the parties that under the law of Michigan, where the contract was entered into, a debt after and as soon as it became due, would draw five per cent interest, whether a demand was made or not, until it is paid.

As shown by the abstract of the record in the case, after the court gave these two instructions, this appears: "To the giving of which instructions by the court as aforesaid, the defendant by its counsel then and there dully excepted."

At the instance of the defendant the court gave two instructions, one to the effect that under the resolution of February 7, 1907, which had been read in evidence, the great commander of the defendant order had no power or authority to enter into any contract for the services of plaintiff, extending beyond the 31st day of December, 1907, and that the resolution and action of the executive committee of the defendant order of February 6, 1908, was the termination of the services of the plaintiff under his employment, and plaintiff is not entitled to recover in this action for any services rendered after notice to him of the action of the executive committee, "unless the jury find and believe under the first instruction given you, that defendant ratified or accepted the contract of February 8, 1907, as made by its great commander." The defendant also asked several instructions to the effect that under the pleadings and all the evidence, plaintiff could not recover; that plaintiff, being employed in the office of the defendant order and having access to its records is charged with knowledge of the contents thereof and the fact that the reso-

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lution of February 7, 1907, read in evidence, is referred to in the contract sued on is sufficient to impute to said Stevens the contents thereof. These were refused, defendant duly saving exceptions to their refusal.

The resolution of February 7, 1907, reads: "Resolved that the salary of the general organizer be and is hereby fixed at the sum of \$2500 for the year ending December 31, 1907."

A verdict for the amount sued for was returned by the jury and in due time defendant filed a motion for new trial which was overruled, the defendant duly excepting. Afterwards and in due time defendant perfected an appeal to this court.

The learned counsel for the respondent contends that there is nothing before us but the record proper, for the reasons, as he claims, that it does not appear that the defendant had objected and excepted to the overruling of the motion for a new trial. In support of this contention he has furnished us with a certified copy of an opinion by the Kansas City Court of Appeals, in the case of *Anna M. Williams v. City of St. Joseph*, delivered by that court on May 3, 1909, wherein it is stated that "the defendant's motion for new trial was overruled and it acquiesced therein since it did not object and except. In such circumstances we cannot pass upon the matters of exception during the trial. And as there does not appear to be any error in the record proper, the judgment will be affirmed." We do not understand this decision of that learned court to go to the extent claimed by the counsel for respondent. It evidently means that there is to be objection or exception, not objection and exception. It does appear in this case that the motion for a new trial being overruled, defendant duly saved exceptions to that action. It is not apparent how it was possible for defendant to have objected or interposed an objection prior to the announcement of the conclusion of the court on the motion for a new trial; clearly it did all it could when

it excepted to the action of the court in overruling the motion for a new trial. That exception, it would seem, includes objection. We hold that objection was duly made and exception duly saved to the action of the court in overruling the motion for new trial and that the whole record is before us.

The further point is made that we cannot inquire into the correctness of the instruction given by the court of its own motion in lieu of all instructions asked by plaintiff, because of the failure of the defendant to object to the giving of this instruction in advance of the instruction being given, the record showing that no such objection had been interposed, but merely showing that after the instruction had been given defendant then excepted. This point appears to be well taken, on the authority of the decision of our Supreme Court in *Sheets v. Ins. Co.*, 226 Mo. 613. 126 S. W. 413. In that case it is distinctly ruled that while appellant's exception to the action of the court in giving instructions was well saved, the record nowhere shows that counsel for appellant made any objection whatever to the proposed action of the court in giving it. Judge BURGESS, speaking for the court in that case, states it as an elementary proposition that before one can legally except to the action of the court in giving or refusing instructions, "he must first request the court to give same or object thereto, as the case may be, before his exceptions will be availing." That not appearing, that is, it not appearing that prior to the giving of it, objection had been made, the court held that the instruction could not be noticed. We confess not to have had this rule called to our attention before, as bearing on objections to instructions, but it is very plainly announced in this *Sheets* case, which is the last opinion by our Supreme Court on the subject, and it must control. No objection, therefore, appearing to have been made to this instruction before it was given, we must accept it as a correct de-

claration of the law and statement of the facts in issue in the case. Independent of this, however, we see no error whatever in the instruction, and when taken in connection with the instructions given at the instances of the defendant, we think the trial court placed the case before the jury in the most favorable aspect to which the defendant was entitled.

We called attention in our statement of the proceedings at the trial, to the fact that most of the objections to which exception was saved by appellant, were that the evidence offered or attempted to be brought out by the question was immaterial. It has long been ruled in our courts that the mere objection to a question, that it is immaterial, is not specific enough to challenge the ruling of the court on the question asked. This is so even in criminal cases. [State v. McKenzie, 228 Mo. 385, 128 S. W. 948, 1. c. 951.] There were, however, specific objections made to the introduction of the contract in evidence, which we have noted. We think they were properly overruled. The fact that a corporate seal does not appear to the contract is not, in itself, fatal to the contract. Apart from this, we have nothing before us calling for a decision as to the correctness of the ruling of the court on any of the really important questions asked and objected to. In spite of the insufficiency of the objection, however, we have read this whole testimony and the record of the trial as set out in the abstract and find no error in the trial court in the admission or exclusion of testimony. It is of no use to set out the evidence in detail, and most clearly it is not subject to the objection of the learned counsel for the appellant, that it utterly fails to make out the case for plaintiff. The instruction given by the learned trial court of its own motion is supported by ample testimony justifying his in his statement of the facts in the case, as submitted to the jury, and under that instruction, even under the instructions asked at the instance of the de-

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fendant, the jury were entirely warranted in arriving at the verdict which they returned in this case.

The judgment of the circuit court is affirmed. *Nor-toni, J.*, and *Caulfield, J.*, concur.

EDWARD O. YANCY, Appellant, v. NEWTON R. JONES, Respondent.

St. Louis Court of Appeals. Submitted on Briefs November 11, 1910. Opinion Filed November 29, 1910.

1. **APPELLATE PRACTICE: Abstracts: Failure to Set Out Entire Evidence.** In an equity case, where appellant's abstract of the record does not contain all of the testimony that was before the trial court, the presumption is, that the trial court committed no error in its findings.
2. ———: ———: ———: **Rules Construed.** Under Rule 9 of St. Louis Court of Appeals, requiring the whole evidence to be embodied in the bill of exceptions in equity cases, the court, on appeal, in an equity case, may refuse to review the sufficiency of the evidence, unless the entire evidence is presented in the abstract of the record, except where the case was tried on an agreed statement of facts, under Rule 22; Rule 8, providing that for the purpose of reviewing the giving or refusing of instructions it shall be sufficient to state there was evidence to prove a particular fact, applying to actions at law.
3. **INJUNCTIONS: Right to Injunction.** A court of equity will not grant an injunction except on clearest proof.
4. **CONTRACTS: Existence: Sufficiency of Evidence.** Evidence held to justify a finding that a contract was not made between the parties.

Appeal from St. Louis City Circuit Court.—*Hon. Moses N. Sale, Judge.*

AFFIRMED.

Peers & Peers for appellant.

R. T. Stillwell and *W. G. Schofield* for respondent.

REYNOLDS, P. J.—To follow and quote from the statement of the case by counsel for appellant, "this is an action in equity by Edward O. Yancy, this appellant, and against Newton R. Jones, this respondent, filed in the circuit court of the city of St. Louis to the April term, 1910, in which appellant seeks to enjoin respondent from selling or causing to be sold, directly or indirectly, any cider, vinegar or competitive goods, in the states of Iowa, Illinois, Nebraska, Missouri or Arkansas for a period of five years, in competition to the O. L. Gregory Vinegar Company of St. Louis.

"The petition in this case is in the usual form and alleges that respondent agreed with appellant that if he, appellant, would purchase respondent's twenty-five hundred shares of stock in the O. L. Gregory Vinegar Company of St. Louis for two thousand dollars, cash; that he, the respondent, would contract and agree not to sell or cause to be sold, directly or indirectly, in the states and territory above mentioned, any cider, vinegar or other competitive goods for any person, partnership or corporation in competition to the O. L. Gregory Vinegar Company of St. Louis for a period of five years from the date of said agreement."

Going to the abstract, we find that in addition to the above matter, it states that the agreement of sale to the above effect, was then reduced to writing for signature by plaintiff and defendant; that plaintiff paid to defendant the sum of two thousand dollars, the consideration agreed upon aforesaid, but that the defendant failed and refused to sign the written agreement and in violation of the agreement had entered into the employ of the St. Louis Vinegar Company, a concern doing business in the city of St. Louis as a dealer in the same and similar articles dealt in by the O. L. Gregory Vinegar Company, and being its competitor in business, to sell its merchandise and products in the states named in competition to the said O. L. Gregory Vinegar Company, and that the defendant has been and

is selling cider, vinegar and other competitive goods of the St. Louis Vinegar Company in competition with the O. L. Gregory Vinegar Company in said states to divers persons, etc., whose names are unknown and cannot be stated, and that he will continue to make and cause to be made, directly or indirectly, such sales of cider, vinegar and other competitive goods to such persons, partnerships and corporations in said states and doing business therein of cider, etc., and other competitive goods, unless restrained from so doing by order and decree of the court, to the great damage and injury of the plaintiff, for which he has no adequate legal remedy, hence he prays for a temporary injunction restraining plaintiff until a hearing of the cause and at the hearing for a permanent injunction restraining him from violating the contract referred to and for general relief. A temporary injunction was granted, bond being filed, an answer containing a specific denial and alleging new matter in avoidance, and a reply filed and a motion to dissolve this injunction. The cause was heard before the court, not alone on the motion to dissolve, but on the petition, answer, reply (which was a general denial of the new matter), and testimony introduced. At the conclusion of the hearing the court dissolved the temporary injunction and dismissed the suit. From this action plaintiff below has duly perfected an appeal to this court.

The rules of this court, and innumerable decisions by it and by our Supreme Court, require, as an indispensable requisite to the review of a cause in equity, when that review calls for an examination of the testimony, that the appellate court should have before it substantially all of the testimony that was before the trial court. Failing that, the presumption always is that the trial court committed no error in the conclusion arrived at on the testimony. It appears from the suggestion of counsel for the respondent, which is not controverted, and beyond all room for doubt, that the

appellant has failed to bring into this court, in the abstract which he has presented for our consideration, all the testimony which was before the trial court, either in extenso or substantially. Rule 9 of our court, which has been in force ever since the organization of the court in substantially its present shape, requires that in cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions. Rule 11 of our court provides: "The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause, being, that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved." Rule 8, providing that for the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions, but it shall be sufficient to state that there was evidence tending to prove a particular fact, or facts in evidence, applies to actions at law, and is for the purpose of enabling this court to intelligently pass on instructions, and instructions are not usually given in causes tried as in equity. Nor have the remarks we here make any relevancy to Rule 22, which applies to causes submitted and tried on agreed statements of the cause of action, facts, etc., and which necessarily cover all facts on which the cause was tried below.

We have had occasion to pass on Rule 9 and on this point lately in the case of Bonet Construction Co. v. Central Amusement Co., decided at this term, and it is only necessary to say in addition to what is there said, that it is useless to have these rules apply to bills of exceptions and then have them entirely disregarded in an abstract presented to us in a cause of equitable jurisdiction when the evidence is to be examined by us as if we were the triers of fact. In addition to the

cases referred to in the Bonet case, on the necessity of having before us, in causes of equitable jurisdiction, all of the testimony which was before the trial court, we refer to McKinney v. Northcutt, 114 Mo. App. 146, l. c. 153, 154, 89 S. W. 351, and authorities there cited.

While we might refrain from passing on the case on its merits by reason of the lack of a complete abstract of the testimony given at the trial, as we are always reluctant, although sometimes compelled, to dispose of a case on failure to comply with settled rules of procedure when satisfied that by so doing we are deciding against the very right of the thing, we have read all the testimony which has been furnished by counsel for the respective parties, and while we have no assurance that we have before us all the evidence which was before the trial court, such of it as is before us warrants us in saying that it fully sustains the conclusion arrived at by the learned trial court. This was an application for an injunction. It is a settled rule that courts of equity ought not to grant an injunction in doubtful cases, but only upon the clearest proof. Plaintiff and his witnesses testify that the agreement was as set out in the petition, and while there is no denial of the facts that defendant refused to sign the proposed agreement and entered upon the sale of competitive goods as agent for a competitor of the O. L. Gregory Vinegar Company of St. Louis in the territory named, the defendant and his witnesses testified as positively that no such agreement was made at the time of the sale and as a condition of the purchase of the stock. It further appears in the testimony that the plaintiff, without defendant having signed the agreement referred to, had from time to time paid defendant the whole of the two thousand dollars, either in cash or by negotiable notes, accepted by the defendant as cash. We gather from questions and remarks of the learned trial judge, made during the examination of plaintiff as a witness, that the court held this to be incompatible with the existence of the agreement claim-

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ed. At all events, we find sufficient in the evidence before us to hold that the conclusion arrived at is fully sustained by the evidence. There were no declarations of law or finding of facts asked or given.

The judgment of the circuit court is affirmed. *Nor-toni, J.*, and *Caulfield, J.*, concur.

CHARLES RAUSENDORF, Respondent, v. AUGUST
F. POLLMAN, Appellant.

St. Louis Court of Appeals. Submitted on Briefs November 15,
1910. Opinion Filed November 29, 1910.

BILLS AND NOTES: Failure of Consideration: Sufficiency of Evidence. Evidence, in an action upon a non-negotiable note, defended on the ground of want of consideration, *held* sufficient to sustain a judgment for the plaintiff.

Appeal from St. Louis City Circuit Court.—*Hon. Hugo Muench*, Judge.

AFFIRMED.

Taylor R. Young for appellant.

William Hilkerbaumer for respondent.

REYLOLDS, P. J.—This is an action on a non-negotiable note for \$650, payable on demand to the order of plaintiff, signed by the defendant, the note to draw interest from date at the rate of six per cent per annum. It appears that plaintiff, as contractor, had furnished material or done labor for the erection of a building by a company for which he had a right to assert a mechanic's lien. Work on the building had been stopped, apparently for lack of means by the owners to complete

it and it and the land upon which it was situated were advertised for sale under a deed of trust given by the owners. The defendant was anxious to buy the property in at the sale under the deed of trust and if he succeeded in doing so, contemplated the completion of the building. In order to enable defendant "to increase his bid in the purchase of the property," at this sale under the deed of trust, he took an assignment of the plaintiff's claim against the property and executed this note, on the agreement that it was not to be paid by defendant unless he purchased the property at the foreclosure sale and if he did he was to resume work upon the building and to pay the note when the construction of the building could be gotten under way. The sale took place under the deed of trust and the property, it is charged, was bought in by defendant. These facts appear in the petition, which avers demand and refusal to pay the note. Defendant answered, admitting the execution of the contract and of the note; denied all other averments; averred that the note was without any consideration; that he had received nothing of value from plaintiff or any other person in his behalf at any time as consideration for the note; averred that the note was upon condition of the purchase by defendant at auction of certain real estate and upon the commencement by defendant of the completion of the buildings then in process of construction; avers that he did not purchase the real estate; did not commence the completion of the building; that neither of the conditions have or will be performed or had happened, by reason of which, as he avers, the title to the claim on account of plaintiff against the original owners of the building never vested in defendant and that the consideration of the non-negotiable promissory note has wholly failed, and denies indebtedness.

The trial was before the court, a jury having been waived. No declarations of law were given, no objections or exceptions to any testimony in the case appear.

There was evidence tending to show that the defendant was the real purchaser of the property, Pollman & Bro. Coal & Sprinkling Co. holding title to it for him until he could pay them for it; that defendant, his wife and son, under the corporate name of the Troy Realty & Construction Co., defendant owning a controlling interest in that company, are now the owners of the property, the Pollman Company passing title by mesne conveyance to defendant, and he conveying to the Troy Realty & Construction Company, and that company was completing the construction of the building. It further appears that on June 11, 1908, demand was made in writing by plaintiff on defendant for the payment of the note, interest being claimed at that time in the amount of \$22.75. Acknowledging the receipt of the demand for payment of the note, the attorney for the defendant wrote on the letter which contained the demand, the following: "We disagree with you and until the time comes when the building is completed or we can effect a sale we will not pay the note." The contract set out and in evidence, it may be remarked, did not require that the building should be completed, or a sale of it effected by defendant, before the note became payable.

At the conclusion of the trial, the court rendered judgment for the amount of the note and interest. Motion for new trial was duly filed, overruled, exceptions saved and the case brought here by defendant on appeal.

There is nothing whatever in this record to justify a reversal. Whether the purchase at the foreclosure sale was for the benefit of plaintiff, was a question of fact. Defendant practically admitted, in answer to a question of the court, that after the purchase by the Pollman Company, that company held the title for him until he could pay them what they had paid for it, which he, his wife and son ultimately did, under the name of the Troy Realty & Construction Co., and there was no con-

tention over the fact that work on the building had been resumed and that it was practically completed.

The judgment affirmed. *Nortoni, J., and Caulfield, J.,* concur.

JOHN GUTHREL, Respondent, v. WILLIAM E. GUTHREL and FRANK M. SLATER, Defendants, FRANK M. SLATER, Appellant.

St. Louis Court of Appeals. Argued and Submitted November 7, 1910. Opinion Filed November 29, 1910.

EVIDENCE: Conflicting Statements Made by Witness: Question for Jury. Where the testimony of a party is conflicting with itself, and his testimony is the sole testimony in the case, the question which version of the transaction given by him is correct is for the jury.

Appeal from St. Louis City Circuit Court.—*Hon. Hugo Muench, Judge.*

AFFIRMED.

Henry B. Davis for appellant.

The court erred in refusing to give instruction No. 1 asked on behalf of defendant. *Marble Co. v. Achuff*, 83 Mo. App. 42; *Weber Mfg. Co. v. Supply Co.*, 149 Mo. 538; *Bank v. Powers*, 134 Mo. 432; *Barton v. Singleton*, 128 Mo. 164; *Shelly v. Booth*, 73 Mo. 74; *Jones on Chattel Mortgages*, sec. 416.

Charles H. Brock for respondent.

The court did not err in refusing to give instruction No. 1 asked for by appellant, for the reason that the testimony of respondent on the question of fact involv-

ed herein, to-wit: whether or not he made an oral agreement permitting the mortgagor to sell a part of the mortgaged property, was conflicting and not beyond dispute. This question, then, was for the jury. *Fleisher Bros. v. Hinde*, 122 Mo. App. 218; *McDonald v. Hoover*, 142 Mo. 484.

REYNOLDS, P. J.—This is an action in replevin, originally brought by plaintiff before a justice of the peace in the city of St. Louis, to recover certain property claimed by him, the property then being in the hands of the defendant Slater, under an execution issued against defendant William E. Guthrel, on a judgment against him in favor of one Cohen. On appeal to the circuit court and a trial there before the court and a jury, it appeared that the plaintiff held a chattel mortgage securing a note, the note being signed and chattel mortgage executed and properly acknowledged by William G. Guthrel, and duly recorded. It appears that the action by Cohen against William E. Guthrel was by attachment but that the constable was in possession of the property under general execution. The only testimony in the case, beyond the chattel mortgage and agreement of facts as to the aforesaid judgment, execution, levy and possession of the property by Slater as constable at the time it was replevied in this action, was that of the plaintiff John Guthrel. His testimony appears to be conflicting and not very consistent in itself, but we gather from it that he was a manufacturer's agent, selling furniture by sample; that he had samples of the goods that he was selling in a store of his own and apparently had some other furniture in the store outside of the samples; that the mode of conducting the business was to show the samples to prospective customers and if they purchased, plaintiff sent in the order to the manufacturer and the goods were furnished from the latter establishment, the samples always remaining in John Guthrel's possession unsold. He

sold out his business to William E. Guthrel about March 9, 1908, the sale covering these samples and also, as it is claimed, some other goods and fixtures, at the same time taking from William the note and mortgage. In one part of his testimony, John Guthrel denies authorizing William to sell any of the goods covered by the mortgage, but further along his testimony is subject to the contention of appellant, that he seems to admit that he sold to William E. Guthrel some articles other than the samples and not in the mortgage, which other articles William E. Guthrel was authorized to sell. But this is not very clear. It is pretty clear that the articles replevied were those covered by the mortgage.

The court, in its instructions to the jury, among other things, told the jury that plaintiff had a right to recover possession of the property referred to in the chattel mortgage, unless they found "that some personal property situated in the store No. 2251 S. Grand avenue, in possession of Wm. E. Guthrel at the date of said mortgage was agreed to be excluded from the terms of said mortgage, as in other instructions defined." In another instruction the court told the jury, among other things, that though they might find that the property in controversy was at the time of the issuance of the writ of replevin in the case in the possession of the defendant Slater in his official capacity as constable under legal process, if they further found and believed from the evidence that the defendant constable held the property under and by virtue of an execution in aid of a general judgment against William E. Guthrel, that this fact alone would constitute no legal bar to the recovery of plaintiff in this case as against the said Frank M. Slater, "unless you further find from the evidence in this case that there was personal property in the store at No. 2251 South Grand avenue, St. Louis, on March 9, 1908, belonging to William E. Guthrel, which it was agreed between himself and plaintiff, John Guthrel, at the time of executing said mortgage, or

thereafter, should be treated as not being covered by said mortgage, or if so agreed might be sold and dealt with by William E. Guthrel without accountability to John Guthrel." Defendant Slater excepted to the giving of these instructions. The court at the instance of appellant told the jury that the chattel mortgage read in evidence covered all the property then owned by William E. Guthrel at No. 2251 South Grand avenue, and if the jury found from the evidence that at the time of making the chattel mortgage or thereafter it was agreed between John Guthrel and William E. Guthrel that the mortgage was not to cover any part of said personal property, then the jury should find for the defendant Slater. The jury were further instructed, at the instance of appellant, that if they believed from the evidence that at the time the chattel mortgage read in evidence was given by William E. Guthrel to John Guthrel, it was agreed between them that the chattel mortgage was only to cover the property furnished to William E. Guthrel by John Guthrel, and that the other property there situated at the premises described, if the jury found that there was other property belonging to defendant William E. Guthrel there, should remain the property of William E. Guthrel and should not be covered by the chattel mortgage and might be sold or dealt with by William E. Guthrel as his own, then the jury should find for the defendant Slater for the return of the property sued for and that the interest of Slater in the property is \$306.28, and the jury should find the value of the property aforesaid and state the same in their verdict. Appellant further asked an instruction directing the jury to find for a return of the property mentioned and find the value of the property and that the interest of the defendant Slater in the property was \$306.28. This instruction the court refused, appellant excepting. Of its own motion the court gave the usual instruction as to the number of jurors required to concur in a verdict. The jury returned a

verdict in favor of plaintiff and that at the time of the commencement of the suit he was and still is entitled to the possession of the property described and assessed his damages for the detention of the property at the sum of one cent. In due time defendant Slater filed his motion for new trial and that being overruled perfected his appeal to this court.

The contention of the learned counsel for the appellant is directed to the refusal of the instruction for a finding in favor of the defendant Slater. While it is true that the evidence of plaintiff was conflicting with itself, the question of there being any secret agreement or arrangement between John and William E. Guthrel, by which the latter was allowed to sell part of the mortgaged property without accounting to the mortgagee for the proceeds was submitted to the jury by the instructions asked and given at the instance both of the plaintiff and of the defendant Slater, so that the court and jury had this witness before them, and it was for the jury to determine what version of the transaction given by plaintiff was correct. They were the sole judges on that point. It is also to be said with reference to this that most of the apparent conflict in the testimony of John Guthrel appears to have arisen over the testimony he gave at the trial and that which he appears to have given when his deposition was taken. At what time the latter occurred does not appear, as the deposition was not offered nor introduced as a whole. Reading over the abstract as prepared by the learned and careful counsel for the appellant, we are rather inclined to think that the conflict resulted more from misunderstanding of each other by counsel and witness than from contradictory testimony by the latter. At all events the jury are the ones to pass on this conflict and their attention was distinctly called to the importance and necessity of finding that there was or was not exclusion of any goods, or any secret agreement, outside of the mortgage, as to the sale, and of the effect

of such agreement, if found, by the instructions given at the request of each party. It is impossible to say that they were not warranted, with these instructions before them, in finding as they did. The judgment is affirmed. *Nortoni, J., and Caulfield, J., concur.*

**BERT F. FENN, Appellant, v. DORA REBER,
Administratrix Respondent.**

St. Louis Court of Appeals. Argued and Submitted November 7, 1910. Opinion Filed November 29, 1910.

1. **BILLS OF EXCEPTIONS: Signing and Allowing: Compelling Action: Mandamus.** The act of a judge of a court of general jurisdiction in allowing exceptions and signing a bill preserving them, while a judicial act, to be performed under the sanction of his oath of office, is under the control of a superior court by mandamus—not to advise the judge how he shall act, but to compel him to move in the matter; the mere act of signing and approving a bill of exceptions being of a ministerial nature, although the court has a legal discretion in determining the character of the particular bill to be signed.
2. **EVIDENCE: Judicial Notice: Personnel of Court.** The appellate court may take judicial notice of what judges were serving as judges of a circuit court under its jurisdiction, but may not take judicial notice of the length of time a particular judge was assigned to a particular division of court nor which of a number of judges was presiding in a particular division.
3. **———: ———: ———: Circuit Court, City of St. Louis: Rotation of Judges Among Divisions.** The appellate court will take judicial notice that the rule of rotation among the judges of the circuit court of the city of St. Louis prevails, under section 4149, Revised Statutes 1909, which provides that the judges of that court shall rotate in service between the nine divisions for the trial of civil cases and the three divisions for the trial of criminal cases, and that the result of sending three of the judges of the civil divisions to the criminal divisions necessarily involves a rotation of the judges among the civil divisions.

4. **BILLS OF EXCEPTIONS: Signing and Allowing.** Under section 2032, Revised Statutes 1909, the judge who is acting as judge of the court at the time the bill of exceptions is presented is the proper one to sign it, although he may not be the successor of the judge who tried the case, by reason of another judge having presided in that court in the meantime.
5. **EVIDENCE: Judicial Notice: Tenure of Office of Circuit Judge.** The appellate court will take judicial notice that a certain circuit judge was elected for a term of office which had not expired.
6. **BILLS OF EXCEPTIONS: Signing and Allowing: Succeeding or Acting Judge: Circuit Court, City of St. Louis: Statute.** The phrase "shall go out of office" in section 2032, Revised Statutes 1909, providing that where a judge who heard the case "shall go out of office" before signing the bill of exceptions, it shall be signed by the succeeding or acting judge of the court in which the case was heard, does not mean, as applied to the circuit court of the city of St. Louis, where, by virtue of section 4149, Revised Statutes 1909, the judges rotate in service between the nine civil and three criminal divisions, that the term of office of the judge who tried the case must have expired, but means that he "shall go out of office" so far as concerns his presiding in that particular division of the court; so that where a case was tried in one of the divisions of said court and the bill of exceptions was signed by a judge other than the one before whom the case was heard but who was then sitting in said division, the record proper showing that the latter judge constituted the court at the time the bill of exceptions was signed and ordered filed, such bill of exceptions was signed by the proper judge.
7. ———: ———: **One Judge Only Qualified to Act: Courts.** Only one judge is qualified to sign a bill of exceptions, and there can be but one judge, whether *de facto* or *de jure*, for one division of court, and the bill must be signed by the judge who is presiding over the court at the time the bill is tendered and filed.
8. ———: **Nature and Purpose.** The object and purpose of the bill of exceptions is to make that a matter of record which otherwise would not be so.
9. **COURTS: Records: Under Orders of Judge.** Nothing can become part of the record of the court unless ordered to be made so by the judge then holding the court and presiding therein, in whom rests the sole power over the court's records.
10. **CONTRACTS: Written Contract: Pleading: Denial of Execution Under Oath.** Where plaintiff filed an account as a claim against an administratrix in the probate court for "legal services rendered," as per agreement to pay twenty per cent, but did not file any instrument in writing or copy thereof, as required

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by section 194, Revised Statutes 1909, on appeal to the circuit court, defendant was at liberty to contest the contract sued upon, although its execution was not denied under oath, since plaintiff did not bring himself within the provisions of the statute relating to written contracts, by filing the original contract or a copy thereof.

11. ———: ———: ———: ———: **Executed by Both Parties.** Where a contract sued upon is signed by both parties, section 1985, Revised Statutes 1909, providing that when any petition shall be founded upon an instrument in writing, charged to have been executed by the other party and not alleged to be lost or destroyed, the execution of such instrument shall be adjudged confessed, unless the party charged to have executed the same deny the execution thereof under oath, does not apply.
12. ———: ———: ———: ———: **Failure to Deny: Defenses Open.** In a suit on a written instrument, the failure of defendant to deny its execution under oath does not preclude all attack on it, but it may be resisted on the ground of illegality, failure of consideration, fraud, or even that it never existed.
13. **PROBATE COURTS: Executors and Administrators: Action on Account: Defenses.** It is always open to the defendant in the probate court, as in that of a justice of the peace, and again in the circuit court, on appeal, to interpose any defenses to an account presented as a demand, provided they are not so inconsistent as to be destructive of each other.
14. **APPELLATE PRACTICE: Objections and Exceptions: Not Made During Trial.** Where objections and exceptions are not made during the trial, they cannot be made in the motion for a new trial or in the brief filed in the appellate court.
15. ———: **Conclusiveness of Verdict.** A verdict, supported by substantial evidence and approved by the trial judge, is conclusive on appeal.

Appeal from St. Louis City Circuit Court.—*Hon. J. Hugo Grimm*, Judge.

AFFIRMED.

T. E. Francis, for appellant, on sufficiency of Bill of Exceptions.

(1) The bill of exceptions was properly authenticated. *Berry Bros. v. Leslie*, 131 Mo. App. 236; *Raney v. Packing Co.*, 132 Mo. App. 324; R. S. 1909, sec. 2032. (2) The phrase "shall go out of office" appearing in sec. 2032, R. S. 1909 means ceasing to preside

in the court or division in which the case was tried, whether by amoval, resignation, death, expiration of term, assignment to another court or division, or any other cause. Cases cited, *supra*.

Bert Fenn, pro se, on merits.

(1) The claim being founded on a written instrument charged to have been executed by defendant, and there being no answer denying its execution, verified by affidavit, the execution of said contracts were never denied. Hence their execution should have been adjudged confess. R. S. 1899, sec. 746; *Rothschild v. Frensdorf*, 21 Mo. App. 318; *Smith Co. v. Rembaugh*, 21 Mo. App. 390; *McGill v. Wallace*, 22 Mo. App. 683; *Faircloth v. Tinsley*, 83 Mo. App. 586. (2) The court erred in refusing to limit the issues and the evidence of the contract of October 25, 1906, to the existence or non-existence of fraud in the procuring of same by plaintiff. It is not only the rule that the facts constituting fraud must be pleaded, but it is also the rule that, when the specific facts are pleaded, the proof must be confined to the precise charges specified. *Story v. Story*, 188 Mo. 110; *Nagel v. Railroad*, 167 Mo. 96. (3) The court erred in permitting defendant to plead fraud in the procurement of said contracts, and that no such contract as October 25, 1906, had ever been signed. *Non est factum* and fraud are inconsistent defenses. *Vette v. Evans*, 111 Mo. App. 588; *Betz v. Home Tel. Co.*, 121 Mo. App. 473.

Theodore C. Eggers and Harmon J. Bliss for respondent.

(1) Settling and signing bills of exceptions are judicial acts, which must be performed by a judge under the sanction of his oath of office, and, unless a different rule has been prescribed by statute, by the one who tried the case and to whose rulings the exceptions were taken. If not so signed the bill is a nullity, and on

appeal nothing comes before the appellate court but the record proper. R. S. 1909, secs. 2029-2033; Consaul v. Liddell, 7 Mo. 250; Cranor v. School District, 18 Mo. App. 397; Sahlein v. Gum, 43 Mo. App. 315; Patterson v. Yancey, 97 Mo. App. 687; Voullaire v. Voullaire, 45 Mo. 602. (2) The provisions Rev. Stat. of Mo. 1909, sec. 1985 providing for the verification by affidavit of an answer to a petition founded upon an instrument in writing, have no application to the case at bar, for the following reasons: First, Because the pleading filed by appellant in this cause does not purport to be founded upon any instrument in writing; Second, Because appellant has not complied with the provisions of the statutes of this state relative to the bringing of actions founded upon instruments in writing. R. S. 1909, sec. 194; R. S. 1909, secs. 1843-44. Third, Because the objection that the answer of respondent was not verified by affidavit was not raised by appellant in the trial court, and cannot be raised for the first time in the appellate court. Ferneau v. Whitford, 39 Mo. App. 311; Boggs v. Laundry Co., 86 Mo. App. 616; Pearson v. Gillett, 55 Mo. App. 312; Kelly v. Thuey, 143 Mo. 437. Fourth, Because it is asserted by appellant that the alleged instrument in writing claimed by him to be sued on in this cause was executed by both parties. Campbell v. Wolf, 33 Mo. 459; Bowling v. Hax, 55 Mo. 446; Kelly v. Thuey, 143 Mo. App. 422.

REYNOLDS, P. J.—Plaintiff below, appellant here, filed an account as a claim against the respondent, administratrix, in the probate court of the city of St. Louis, the account being for \$371.20, for "legal services rendered in collecting eighteen hundred and fifty-six dollars and fifty-seven cents from the Pittsburg Life & Trust Company as per agreement of twenty per cent," also for three items, amounting to \$5.50, for sums of money paid out by plaintiff for certain costs, etc. Beyond this account no other statement of the cause of

action was filed in the probate court; notice of demand on the administratrix and affidavit of service of it on her, however, being also filed. It appears that the case was tried in the probate court before a jury and from the verdict rendered by it an appeal was taken to the circuit court. On a trial *de novo* in the latter, before the court and a jury, there was a verdict for the plaintiff for the \$5.50, being the items of money paid out, from which, after interposing a motion for new trial and saving exceptions to that being overruled, plaintiff below has duly perfected an appeal to this court.

It appears from the abstract of the record proper that on January 11, 1910, and during the December term, 1909, of the circuit court, "plaintiff's bill of exceptions was by the court approved, allowed, signed, sealed, ordered filed, and thereupon on the day and at the term last aforesaid, filed with the clerk of said court, all of which is shown by orders of record of that date (Book 230, page 465). Said bill of exceptions, omitting caption and formal parts, is as follows:" Then follows the bill of exceptions. It also appears by the abstract of the record proper that the trial of the cause was begun in the circuit court of the city of St. Louis on January 23, 1909, during the December term, 1908, by the court and a jury, and was concluded on January 23, 1909, during that December term. It further appears from the abstract of the bill of exceptions that it was signed by the Hon. Daniel D. Fisher, he signing as "Judge of Division No. 2 of the circuit court of the city of St. Louis, State of Missouri, in and for the Eighth Judicial Circuit on the date aforesaid, that is, January 11, 1910." It does not appear that the bill of exceptions was approved or consented to by any attorney for defendant, while it does appear that the bill of exceptions was prepared and submitted by the attorneys for the appellant.

I. It is urged by the learned counsel for respondent, that as the abstract shows the cause was tried in the circuit court before the Hon. J. Hugo Grimm, while the bill of exceptions was signed by the Hon. Daniel D. Fisher, that therefore the bill of exceptions is not properly signed and is invalid, it being argued that in the absence of a special statute to the contrary, the bill of exceptions must be signed by the judge who tried that case, and that otherwise the bill is a nullity and nothing is before the appellate court but the record proper. In support of this proposition, we are referred to sections 2029 to 2033, R. S. 1909; *Consaul v. Liddell*, 7 Mo. 250, l. c. 258; *Voullaire v. Voullaire*, 45 Mo. 602; *Cranor v. School District, etc.*, 18 Mo. App. 397; *Sahlein v. Gum*, 43 Mo. App. 315; *Patterson v. Yancey*, 97 Mo. App. 681, 71 S. W. 845.

The counsel who argued this point in the case at bar for appellant cites *Berry Bros. v. Leslie*, 131 Mo. App. 236, 110 S. W. 685, and *Ranney v. Packing Co.*, 132 Mo. App. 324, 110 S. W. 613, as supporting his contention, and in argument before us denied the application of the cases cited by counsel for respondent, and claimed that the remark of Judge Goode in *Patterson v. Yancey*, *supra*, l. c. 692, that this court ruled "that the bill of exceptions was properly authenticated by the signature of Judge Fort, without ruling that it would have been invalid had Judge Evans signed it," is to be held as a strong intimation, judging the opinion by the trend of its reasoning, that it would have been valid if signed by Judge Evans, the judge of the circuit in which Carter county was included when the bill was signed and filed and made of record.

Section 2032, Revised Statutes 1909, provides that "in any case where the judge who heard the cause shall go out of office before signing the bill of exceptions, such bill, if agreed to be true by the parties to the action, or their attorneys, or shown to the judge to be correct,

shall be signed by the succeeding or acting judge of the court where the case was heard."

The question presented for consideration, arising out of that section, is as to whether there is sufficient in the record to show us that the Honorable J. Hugo Grimm had gone out of office as judge in Division No. 2 of the circuit court and the Honorable Daniel D. Fisher was either the successor or the acting judge, presiding in that division—that being the division in which the case was heard—at the time the bill was presented, signed and admitted to record, in such sense as to warrant him, under the provisions of the statute, in signing the bill of exceptions tendered by the attorneys for plaintiff below, it appearing that it had not been agreed to by counsel for the defendant nor filed with their consent.

The act of the judge of a court of general jurisdiction in allowing exceptions and signing the bill preserving them, while a judicial act, "to be performed by a judge under the sanction of his oath of office," (*Patterson v. Yancey*, *supra*, l. c. 687), has always been recognized in this state as under the control of a superior court by mandamus, "not to advise the judge how he shall act but that he shall move in the matter." [*State ex rel. Millett v. Field*, 37 Mo. App. 83, l. c. 95.] This is the rule prevailing generally. See *High, Extraordinary Legal Remedies* (3 Ed.), secs. 199 to 215a; the mere act of signing and approving the bill of exceptions, however, being held to be of a ministerial nature, although a legal discretion is to be observed in determining the character of the particular bill to be signed. [*High, supra*, sec. 201.] From the time of the opinion rendered by Judge SCOTT in 1860, in *Walker v. Stoddard* Circuit Judge, 31 Mo. 123, down to the latest case which has come under our observation, covering the matter of controlling the action of an inferior court by mandamus, that of *State ex rel. Priddy et al. v. Gibson*, 187 Mo. 536, 86 S. W. 177, a decision by Judge LAMM, speak-

ing for the Court in Banc in 1905, our Supreme Court has invariably asserted, and in very many cases exercised its right, by the writ of mandamus, to control the action of a judge of an inferior court, to the extent of compelling that judge to act, not how he should act, but to act, on a bill of exceptions being properly presented to him for his approval and signature.

An examination of the cases cited by counsel, as well as of others relating to the signing of bills of exception, does not throw very much light on this point as it arises in this particular case. In all of them, it is true, there is discussion of the law governing the signing of bills of exception, but no decision involving the construction of section 2032 as applicable to the situation created in the Eighth Judicial Circuit by the statutes relating to that circuit, has, so far as we know, been presented for adjudication in connection with that section. That situation is now before us and demands consideration of the mode of procedure and practice peculiar to the circuit court of the Eighth Judicial Circuit, which circuit comprises the city of St. Louis alone.

The law relating to that court is now article 8, of chapter 35, sections 4147 to 4167, Revised Statutes 1909. That court, as at present constituted, is composed of twelve divisions. While section 4149, as published in the revision of 1909, provides for but two divisions for the trial of criminal causes, by Act of March 21, 1905 (Laws, 1905, p. 127), three such divisions are provided for, divisions Nos. 1 to 9 having jurisdiction of civil, and Nos. 10, 11 and 12 of criminal, causes. After sections providing for the twelve divisions and for the salary of the judges, follows section 4149, which provides, among other things, for two (or as amended, for three) divisions for the trial of criminal causes, and that the judges assigned to the criminal divisions shall sit in those divisions "for the trial of criminal causes then or thereafter pending in said court, and for the disposition of such other business arising under the criminal jurisdic-

tion of the court as may come before it, and to whom shall thereupon be transferred for trial and disposition, in such proportions between themselves as said court in general term shall determine, all of the unfinished cases, actions and proceedings which shall have been, on the first Monday of January, 1897, transferred to said court from the said criminal court. The judges so assigned for the trial of said criminal cases, and the disposition of other business arising under the criminal jurisdiction, shall try and dispose of the cases so transferred to them, and conduct the business arising under said criminal jurisdiction during such time or times as the court, in general term, may direct, and said general term shall, from time to time, replace the judges so assigned to try said criminal cases and dispatch said criminal business, with other of its members selected by it to that end, and, as far as practicable, alternately and in rotation, so that from time to time each of their number shall in turn serve in the transaction of the criminal business of the court, unless the judges, sitting in general term, shall in their discretion, excuse any member of the court from so serving." It may be said in passing, that section 4149, in terms, applies particularly to the criminal divisions of the court and the disposition of business therein, and it is very evident that it would be a forced construction to say that the judges so assigned to the criminal divisions could not sign bills of exceptions in criminal cases in which steps had been taken by their predecessors on the bench. Section 4152 provides that "in addition to the ordinary power of making rules conferred by the general law, the court may make all rules which its peculiar organization may, in its judgment, require different from the ordinary course of practice and necessary to facilitate the transaction of business therein," all rules for the governing of the court at special term being uniform for each division.

The peculiar construction of the circuit court of the Eighth Circuit was considered to some extent in the case of *State ex rel. McCaffery v. Eggers*, 152 Mo. 485, 54 S. W. 498. Judge VALLIANT speaking for the Court in Banc and referring to what are now sections 4151 and 4152, Revised Statutes 1909, and quoting from what is now section 4152, refers to the fact that under the statute the circuit court of the city of St. Louis, in general term, is required to make rules for the distribution of the cases among the divisions in special term. We have quoted section 4152 above. Judge VALLIANT further states that when a case is regularly assigned to a particular division, "that division for the purposes of that case is as exclusive in its jurisdiction as if it were the whole court or as if the court was a unit; another division or another judge presiding in special term has no more jurisdiction over that case than the circuit court of an adjoining county. So held in *Haebl v. Railroad*, 119 Mo. 325." This *Raehl* case, as well as the *Eggers* case, was followed and approved in *Goddard to use v. Delaney*, 181 Mo. 564, l. c. 581, 80 S. W. 886.

As that circuit and its courts are within the appellate jurisdiction of this court, we not only have before us the law which provides that its judges are to rotate in service between the civil and criminal divisions, but we are also warranted in taking judicial notice of the fact that at the time when this bill of exceptions was filed, the Honorable J. Hugo Grimm and the Honorable Daniel D. Fisher were judges in office, serving as circuit judges of the Eighth Circuit. It is not thought, however, that we can take judicial notice, in the absence of anything in the record showing it, of the fact as to the length of time a particular judge was assigned to a particular room or division, nor can we take judicial notice, outside of the record in each case, of which one of the judges, at any specified time, was in office and exercising the functions of judge in any particular room or division. We have nothing in this record to enable

us to say that Judge Grimm was transferred to the criminal division and Judge Fisher assigned to replace him in Division No. 2, but we have a right to take judicial notice of the fact that the rule of rotation among the judges of that court prevails under the statute and that the result of sending three of the judges from the civil divisions into the criminal divisions necessarily involves a rotation in the office of the judges, so far as respects their service in even the civil divisions of the circuit court, and it appears affirmatively in the record proper that it was signed and ordered of record by the court, and that the Honorable Daniel D. Fisher constituted the court.

It is apparent from the abstract of the record and bill of exceptions, that the Hon. J. Hugo Grimm was the judge before whom the cause was tried, presiding in Division No. 2 of the court, and it is stated that the trial was begun on the 23d of January, 1909, during the December, 1908, term of the court and was concluded on that day. It is fair to infer, therefore, that Judge Grimm presided at the trial from beginning to end. It is recited in the record proper as set out in the abstract, that on the 26th day of January, 1909, during said December term and within four days after the rendition of the verdict, the motion for new trial was filed and that it was continued to the February, 1909, term of the court, when it was overruled, and that an appeal was granted during that term to this court and that an extension of time for filing the bill of exceptions was granted down to and including the 12th of January, 1910, and that the bill of exceptions was filed on the 11th of January, 1910, that is to say, it was filed within the time granted by the various extensions of time. The entry in the abstract of the record proper recites that on this 11th of January, 1910, and during the December, 1909, term, the plaintiff's bill of exceptions was by the court approved, allowed, signed, sealed, ordered filed and filed. In this respect it corresponds to

what appears to be the state of the record as presented in *Martin v. Castle*, 182 Mo. 216, 81 S. W. 426. We are not advised by any recitals in the record or abstract, when the Honorable Daniel D. Fisher took his seat and presided in that division of the circuit court, beyond the fact of the recital that the bill was filed in court on the 11th of January, 1910, having been allowed, signed, sealed and ordered filed on that day by the court. Whether, within the meaning of section 2032, Judge Grimm "heard the cause," is not shown, if by "heard the cause," is meant, not the mere trial of it, but the motion for the new trial and action thereon and the various extensions of time for filing the bill.

It was not necessary that Judge Fisher should have been the immediate successor of Judge Grimm—he might have been, or might not: another judge may have presided in that division between the incumbency of Judge Grimm and that of Judge Fisher; the statute requires the then acting judge to sign. We have a right to assume that Judge Grimm had, under the statute and the rule of court, been transferred to some other division, whether criminal or civil is immaterial. While we take judicial notice of the fact that Judge Grimm was elected for a term of office as a circuit judge which has not expired, it is clear from this record here before us, that he had "gone out of office," so far as concerns presiding as judge of Division No. 2; he had gone from that division, to all intents and purposes as entirely as if his office as circuit judge had terminated; it certainly had terminated for the time being, unless he and Judge Fisher were both judges in that division at one and the same time. As our law makes no provision for two judges presiding at one and the same time in the same division, this could not be. [*Ranney v. Packing Co.*, supra.]

No question of the tenure of office of the Hon. J. Hugo Grimm or of the entering upon office of the Honorable Daniel D. Fisher is involved, no disability on

the part of the judge who tried the case is suggested, so that this case is presented on the sole point of one in which the bill of exceptions is signed by the judge who then presided in the division of the court in which the case was tried, and section 2032, Revised Statutes 1909, specifically provides that in any case where the judge who heard the cause shall go out of office before signing the bill of exceptions, such bill, if agreed to be true by the parties to the action or their attorneys or shown to the judge to be correct, shall be signed by the succeeding or acting judge of the court where the case was heard. We do not construe this section 2032, when it uses the language, "shall go out of office," as meaning, in a case presented by the peculiar construction of the circuit court of the city of St. Louis, that his term of office must have expired, but construing that section in connection with the fact of which we take judicial notice, that the judges of that court exchange from one division to another, we hold these words to mean in that connection "shall go out of office," so far as concerns presiding in that particular division of the court.

Bearing in mind what is said by our Supreme Court in *Goddard v. Delaney*, *State ex rel. v. Eggers and Haehl v. Railroad*, *supra*, to the effect that while the circuit court of the city of St. Louis, comprising the Eighth Judicial Circuit, is one court, composed of many parts called divisions, yet each division for certain purposes, among others the disposition and trial of causes to their conclusion, unless pending their determination a change of venue has been awarded from one division to another, or from that circuit to another, is in itself a complete court, independent of each of the other divisions, we therefore hold that it clearly appears by the record in this cause that at the time when the bill of exceptions was settled, signed, approved and filed, the Honorable Daniel D. Fisher was the acting judge of Division No. 2 of the circuit court of the city of St. Louis, the divis-

ion of the court in which the case was tried. As said in *Martin v. Castle*, *supra*, "It is inconceivable to us how there could be any question as to the authentication of the bill, or of its identification under the circumstances."

Counsel for respondent rely upon *Patterson v. Yancey*, *supra*, as decisive in their favor. As before remarked, we do not think that case meets the one at bar. Nor can we reconcile it with the great weight of authority in this state. Under all the decisions and the law, there is but one judge qualified to sign a bill of exceptions, and there can be but one judge, whether *de facto* or *de jure* for one division of any one court sitting and holding that court. [*Ranney v. Packing Co.*, *supra*; *Martin v. Merc. Town Mut. Fire Ins. Co.*, 124 Mo. App. 221, 101 S. W. 672.] The bill must be signed by the judge who is presiding over the court at the time the bill of exceptions is tendered and filed, the judge or person acting as judge, who signs it being at the time presiding in that court, either by special election or by assignment as provided by law. In *State ex. rel. v. Gibson*, *supra*, it is held that because Judge Gibson had gone out of office mandamus would not lie against him to sign a bill of exceptions.

The reason which lay at the foundation of the old rule, that if a judge who had tried a case went out of office pending action on a motion for a new trial, his successor must, as of course, grant a new trial, has been taken away by modern methods of court procedure, under which the official reporter takes down stenographically and verbatim all the proceedings at the trial, often indeed such occurrences in the progress of the case as rulings on motions, etc. By our modern practice a judge has before him, in the notes of the official reporter, all that took place in the cause, and it is within his power, when a bill of exceptions is tendered for his approval, to satisfy himself as to its correctness; it is easy for the bill to be, in the language of section 2032,

"shown to the judge to be correct." He can test its correctness by the notes of the official reporter, even by the signature of his predecessor in office; in any of the many ways by which those things of which we have no personal knowledge, may be shown to us to be correctly recited. But it must be signed, ordered filed and made of record in the court by the judge then presiding therein. It is always the duty of the judge, in signing a bill of exceptions, to know for himself that the bill tendered is correct; he is the one who is ultimately responsible for its correctness. It is a mistake to overlook the very real and sole object and purpose of a bill of exceptions; that is, to make that a matter of record of the court which before then and without the bill, was not of record—matters which arose in the progress of the case and not otherwise of record proper; not of the record of the court unless preserved by bill. By the filing of that bill it becomes incorporated into and becomes a part of the record. Nothing can be and become of the record of a court, unless ordered to be made of record by the judge then holding the court and presiding therein, in whom rests the sole power over those records. Applying section 2032 of the statute to the peculiar situation which must inevitably often arise in the circuit court of the city of St. Louis, we repeat that we hold that the bill of exceptions here involved was signed by the proper judge, and that it, with the record proper, is before us, open to our review.

II. Turning to the case on its merits, a careful reading of the testimony and of the proceedings at the trial, satisfies us that there was no reversible error committed. As to most of the points urged for a reversal, exceptions were not taken and preserved in such a manner that we can consider them.

It is urged that the defendant below, not having denied the execution of the contract relied on under oath, was not at liberty to contest it at the trial. That objection has no place in this case. Plaintiff did not

bring himself within the provisions of the statute relating to actions on written contracts. No contract such as referred to in section 194, Revised Statutes 1909, that is, no original or copy, as in case of a lost one, of an instrument of writing upon which the claim is founded, was filed. Nor is the action on an instrument of writing charged to have been executed by the other party and filed, or on such an instrument of writing, alleged to have been lost or destroyed, of which a copy is filed. It has been ruled in many cases, that these sections of our statute referred to, do not apply to instruments executed by both parties. It is very clearly apparent in the case at bar that the instrument in writing relied on as the contract between the parties was not filed with the statement of the account. That statement does not even allege a written contract. It is equally apparent from an examination of the proceedings at the trial that the contract relied upon was signed by both parties. Hence section 1985, Revised Statutes 1909, does not apply. [See *Kelly v. Thuey*, 143 Mo. 422, 45 S. W. 300.] A fatal objection to the consideration of this point is, however, that it was in no manner raised and saved by any exception in the trial court. Failing that, it cannot be here first made.

It is urged that the execution of the contract not having been denied under oath, its validity or fraud connected with obtaining it, is not open to inquiry. This is not the law. Even in a case where the maker of a note has failed to deny its execution under oath and has admitted its execution, its legality is open to contest without a denial of the execution of the note, verified by affidavit. [*Wells v. Hobson*, 91 Mo. App. 379.] It is held in *Johnson v. Woodmen of the World*, 119 Mo. App. 98, 95 S. W. 951, that though the execution of a contract in writing is not denied, it is open to the defendant to prove that it never existed or that the consideration for it had failed. The rule laid down in these cases applies with even more force in the case at

bar than in them, for in them the pleadings were written, while here, beyond the account filed in the probate court, there were no pleadings; all pleadings, save the statement, were, as they may be, oral, and in the trial, which is *de novo* in the circuit court, no pleadings are required. It is always open to the defendant in the probate court, as in that of a justice of the peace, and again in the circuit court, to interpose any defenses whatever that she has to the account presented as a demand, provided they are not so inconsistent as to destroy each other. [Munford v. Keet, 154 Mo. 36, 55 S. W. 271; Bank v. Stewart, 136 Mo. App. 24, l. c. 35, 117 S. W. 99.] The defendant in this case has a right to show, if she could, that the contract alleged to have existed between her and the plaintiff was obtained by fraud or that it had been rescinded or even that it had never existed. Both our Supreme and Appellate Courts have held in many cases, that the defense of fraud is available at law. [See *inter alia*, Earl v. Hart, 89 Mo. 263, l. c. 270, 1 S. W. 238.]

Over and above all, and fatal to the case of plaintiff, is the fact that proper objections and exceptions were not made during the trial. They are first made in the motion for a new trial as to some, as to others, by the brief in this court. That cannot be done. [Kelly v. Thuey, *supra*, l. c. 437.]

In the motion for new trial in this case, the allegations of error are general, that the court erred in the reception or exclusion of testimony. But when we look into the abstract of the proceedings at the trial, we fail to find objections and exceptions that cover the points now presented and urged upon us as a ground for reversal. Examining all of them, we do not think any of them are tenable. No attack is made in the motion for new trial on the instructions asked. We have read all of the rather voluminous abstract of the testimony, as the learned counsel for the appellant challenges it as lacking in any probative facts which can sustain the

verdict and judgment of the trial court. It is conflicting at almost every material point. We are therefore bound by the conclusion arrived at by the jury and the trial court. We find in the verdict no evidence of prejudice or passion, as claimed by counsel, but are bound to say that there is very substantial testimony to support the conclusion arrived at by the jury. Its weight was for the learned trial judge. All that we are responsible for is to see that it was properly, in the case, that it substantially sustains the verdict and that no error of law appears. Examining this record, we find no reversible error in any of the rulings of the learned trial court on the admission and exclusion of testimony; there is substantial evidence to warrant the verdict; there is no error of law which is properly saved. The instructions which were given, as before noted, are not before us by a proper exception in the motion for new trial, giving or refusing instructions not being assigned as error. We find no reversible error in the case. The judgment of the circuit court is affirmed. *Nortoni, J., and Caulfield, J., concur.*

OSCAR PRYIBIL, Appellant, v. HENRY ALTE-MEYER, Respondent.

St. Louis Court of Appeals, December 30, 1910.

1. **BILLS AND NOTES: Ownership: Evidence.** The payee named in a negotiable bill and in possession of it is prima facie its owner.
2. ———: **Payment: Evidence.** The right of the payee of a negotiable bill to recover against the drawee cannot be affected by showing payment by the drawee to another, even though the payee's predecessor in title, in the absence of proof that such other was the holder of the bill or duly authorized agent of the holder, or in possession of it at the time.

Appeal from St. Louis City Circuit Court.—*Hon. Virgil Rule*, Judge.

REVERSED AND REMANDED.

Frank E. Richey and *Campbell Allison* for appellant.

(1) The signing of the two acceptances to Oscar Pryibil, and the acceptance of a receipt signed by the president of the Royal Cigar Company, stating "This account has been settled by two acceptances to Oscar Pryibil," shows that it was the agreement that these acceptances should operate to extinguish the debt, and the debt, as evidenced by the account of the Cigar Company against Altemeyer, was paid by these two acceptances, hence evidence of payment to the Royal Cigar Company, through constable Morrissey was inadmissible. *Cave v. Hall*, 5 Mo. 59; *Block v. Dorman*, 51 Mo. 31; *Montgomery County v. Auchley*, 103 Mo. 492; *Comisky v. McPike*, 20 Mo. App. 820; *Shotwell v. Monroe*, 42 Mo. App. 669. (2) The giving of the acceptances in question, and the receipt from the president of the Royal Cigar Company to the effect that the account had been settled thereby, the statement made by Pryibil to Altemeyer that the Royal Cigar Company owed him money, and that he would assume the account, are sufficient notice to Altemeyer of the assignment of the account to Pryibil. *Rhodes v. Outcalt*, 48 Mo. 367; *Meyer v. Bloom*, 80 Mo. 179; *Roan v. Davis*, 104 Mo. 549; *Plow Co. v. Sullivan*, 158 Mo. 440; *Stern Auction Co. v. Mason*, 16 Mo. App. 473.

Frank B. Coleman for respondent.

The consideration for the acceptances in question was the goods bought from the Royal Cigar Co. and it owned the acceptances unless there was at some time a valid assignment to plaintiff either of the account or

the acceptances. The president of the Royal Cigar Co. had no authority to appropriate to himself an asset of the company. *Turner v. Hayden*, 33 Mo. App. 15. Even if there was ever a valid assignment from the Royal Cigar Co. to appellant, it could not affect respondent until he had due notice thereof. *Richards v. Griggs*, 16 Mo. 416; *Leahey v. Dugdale*, 41 Mo. 517; *Houser v. Richardson*, 90 Mo. App. 134; *Nielsen v. City*, 91 Minn. 388.

CAULFIELD, J.—This suit originated in a justice's court of the city of St. Louis, to recover upon two negotiable bills, each for \$26.53, drawn by plaintiff upon defendant, dated April 23, 1898, and payable May 10, 1898, and May 20, 1898, respectively, to the order of plaintiff, for value received, and unconditionally accepted by defendant. They bore an endorsement in blank by plaintiff, and one of them had a credit of five dollars.

The trial in the circuit court was before a jury, defendant had judgment, and plaintiff has appealed.

The plaintiff introduced the bills in evidence. Defendant admitted accepting them, and gave evidence tending to prove that at the time he accepted them he gave them direct to the Royal Cigar Company, a corporation, of which plaintiff was president, for goods sold and delivered. Against the objection of plaintiff, the court permitted the defendant to introduce evidence that in 1901 he paid the amount of the bills to the Cigar Company, but the record before us does not disclose that there was any proof offered that the Cigar Company was the holder or had possession of the bills or represented the holder, at the time of the alleged payment. The admission of said evidence of payment was error. The plaintiff being the payee named in the bills and in possession of them at the trial is *prima facie* their owner. His right to recover cannot be affected by showing payment to another, even though his predecessor in

title, without proof that such other was the holder of the bills or the duly authorized agent of the holder, or in possession of them at the time. Judgment reversed and cause remanded. *Reynolds, P. J., and Nortoni, J., concur.*

ARTHUR F. OEHMEN, Respondent, v. FREDERICK H. PORTMANN and JULIUS G. WOEMPNER, doing business as the F. H. Portmann Storage Company, Appellants.

St. Louis Court of Appeals, December 30, 1910.

1. **BAILMENTS: Action for Damage to Property Bailed: Estoppel of Bailee to Deny Title of Bailor.** Where a person receives personalty under a contract with another to transport it, and thereby becomes bailee of the latter, he incontestably concedes the bailor's title, unless at least he can show the true owner is making an adverse claim.
2. **PARENT AND CHILD: Guardian and Ward: Natural Guardian: Right of Parent to Sue for Injury to Child's Property.** Where a child derives title to property from her father, he is entitled to the custody thereof as her natural guardian and may sue for its injury under the express provisions of sections 403, 423, Revised Statutes 1909.
3. **BAILMENTS: Parent and Child: Right of Parent to Sue for Child's Bailed Property.** Where a parent delivers a piano belonging to his child to others to be moved, and they injure it, the parent need not sue as natural guardian for damages, but may sue in his own right as bailor; and a recovery by him would inure to the benefit of his ward and would estop him from presenting a further demand as such guardian.
4. **APPELLATE PRACTICE: Instructions: Harmless Error.** An instruction which is erroneous as requiring the jury to find facts not essential to plaintiff's recovery is not prejudicial to defendant, and he cannot be heard to complain thereof.
5. **DAMAGES: Instructions: No Evidence.** In an action for damages to personal property, an instruction on the measure of damages submitting elements of damages not supported by the evidence is erroneous.

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6. APPELLATE PRACTICE: Excessive Damages: Remittitur.

Where certain elements of damages are erroneously submitted to the jury, but the proof concerning an element for which a recovery might be had is exact and definite as to amount, the appellate court may affirm the judgment on condition that it be remitted down to such definite amount, rather than reverse the judgment and remand the cause.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Williams, Judge.*

AFFIRMED (*conditionally*).

Geo. W. Lubke and Geo. W. Lubke, Jr. for appellants.

(1) A verdict not supported by substantial testimony justifying it will not be allowed to stand by an appellate court. There was no substantial evidence in this case that plaintiff was the owner of the piano in question. *Price v. Lederer*, 33 Mo. App. 426; *Rottman v. Pohlmann*, 28 Mo. App. 399; *Avery v. Fitzgerald*, 94 Mo. 207; *Archambault v. Blanchard*, 198 Mo. 384. (2) Instructions must be predicated on the evidence. *Willis v. St. Joseph*, 111 Mo. App. 580; *Chambers v. Railroad*, 111 Mo. App. 609; *Fisher v. St. Louis Transit Co.*, 198 Mo. 562; *Wellmeyer v. St. Louis Transit Co.*, 198 Mo. 527; *Wagner v. Railroad*, 118 Mo. App. 239; *Phe-lan v. Paving Co.*, 115 Mo. App. 423; *Millinery Co. v. Johnston*, 131 Mo. App. 693; *St. Louis v. Kansas City*, 110 Mo. App. 653. (3) In the absence of evidence tending to show the value of the use of the piano while it was being repaired, and of the depreciation in value, if any, by reason of its being injured, it was erroneous to instruct the jury to consider these elements of damage, notwithstanding they were alleged in the petition. *Boyce v. Railroad*, 120 Mo. App. 168; *Mannerberg v. Railroad*, 62 Mo. App. 563; *Stoetzele v. Swearingen*, 90 Mo. App. 588.

Ellroy V. Selleck for respondent.

STATEMENT.—Action against defendants for damaging a piano while moving it from a residence on Leffingwell avenue in the city of St. Louis to one on Madison street.

The petition declares that on August 10, 1907, plaintiff delivered his piano in good condition to the defendants at No. 1625 North Leffingwell avenue, the defendants being in the piano moving business, and the defendants agreed for a valuable consideration to be paid to them, to safely move it to No. 2810 Madison street, but in violation of their duties as carriers of plaintiff's piano, they failed to exercise ordinary care in moving said piano and so negligently moved it that it was broken, split and battered and its strings loosened and strained and out of tune, and was delivered to plaintiff in such damaged condition and unfit for use. That by reason of said negligence and failure of defendants, plaintiff was compelled to spend forty dollars for removing his piano to and from a repair shop and in attempting to have it repaired and was deprived of the use of the piano about fifteen weeks from the time the piano was injured until it was returned from the repair shop, and that the piano still remains damaged. That plaintiff had been damaged in the sum of two hundred dollars, for which sum he prayed judgment.

There was judgment for one hundred dollars in plaintiff's favor in the circuit court and defendants have appealed to this court.

The defendants concede that they were in the piano moving business at the time alleged and that the piano was delivered to them by the plaintiff and that they contracted to move it for him as alleged, and there is evidence tending to prove that while they were moving the piano, it was broken, etc., through their negligent

handling of it, and that plaintiff was compelled to expend forty dollars for its repair.

The plaintiff testified, however, that while he had bought and paid for the piano he had made a present of it to his thirteen-year-old daughter before he had contracted with the defendants to move it, and there was nothing contradictory of this testimony in the record.

The court over the objection of the defendants, who duly excepted, gave the following instructions at the instance of plaintiff:

"1. If you find from the evidence adduced in this case that defendants did on or about the 10th day of August, 1907, undertake to carry for hire for the plaintiff herein, one piano as mentioned in the evidence, if you find that the plaintiff was the owner of said piano, from a place known as number 1625 North Leffingwell avenue to number 2810 Madison street in the city of St. Louis and State of Missouri, as mentioned in the evidence, and if the jury find from the evidence that the plaintiff herein was on the 10th day of August, 1907, the owner of the piano mentioned in the evidence, and that at said time it was delivered to defendants, or their servants and agents in good condition and undamaged in any manner, and if you further find from the evidence that the defendants or their servants or agents whilst carrying said piano as mentioned in the evidence failed to exercise that same degree of care as persons of ordinary prudence would usually exercise under like circumstances for the safe handling of said piano, and if you further find from the evidence that the servants and agents of defendants negligently and carelessly handled the piano in placing it in the building known as number 2810 Madison street as mentioned in the evidence and by reason of such negligent acts committed by the servants or agents of defendant, the piano was damaged as mentioned in the evidence and directly caused thereby, then your verdict must be for the plaintiff.

"2. If the jury find for the plaintiff, they should assess his damage at such a sum as they believe from the evidence will be a fair compensation to him.

"First: For all damages to the piano if any by being broken, battered and split caused by the negligence of the defendants, or their servants and agents, and directly caused thereby as mentioned in the evidence, to the reasonable value thereof.

"Second: For any loss of the use of said piano while it was being repaired to the reasonable value thereof.

"Third: For any expense not exceeding the sum of forty dollars to plaintiff in repairing his piano to the reasonable value thereof providing however that the total amount of your verdict if any in favor of plaintiff shall not exceed the sum sued for."

CAULFIELD, J. (after stating the facts).—I. Defendants contend that plaintiff's first instruction was erroneous because it submitted to the jury the issue whether the piano was the property of the plaintiff, when there was no evidence upon which the jury could have based such a finding. This contention is based upon the showing made by the record that when the piano was delivered to and injured by the defendants, it really belonged to plaintiff's thirteen-year-old daughter, having been bought and paid for by him and given to her as a present. If this were a case where plaintiff's title was properly in issue, the submission of that issue upon the showing made would have been reversible error. But it is not such a case. The defendants received the possession of the piano under the contract with plaintiff and thereby became his bailees and by force of the contract of bailment incontestably conceded the title to be in him, unless at least they can show that the true owner is making an adverse claim. [Sherwood v. Neal, 41 Mo. App. 416, 424; Bricker v. Stroud Bros., 56 Mo. App. 183, 186.] There is no pretense here

of any such adverse claim. On the contrary, the plaintiff's child derived her title from him, and he was therefore entitled to the custody and care of the piano as her natural guardian and to sue for its injury. [Sections 403, 423, R. S. Mo. 1909; Rhoades v. McNulty, 52 Mo. App. 301; Brandon v. Carter, 119 Mo. 572, 24 S. W. 1035.] His recovery here would estop him from presenting a further demand as such guardian and would inure to the benefit of his ward to the extent of her interest. [Gratiot St. Warehouse v. Missouri, Kansas & Texas Ry. Co., 124 Mo. App. 545, 565, 102 S. W. 11.]

It is true as held in Rhoades v. McNulty, *supra*, that a father cannot recover as the natural guardian of his child without the pleading showing that he sues as such guardian. But the plaintiff is not suing as guardian and need not do so. He is suing in his own right as bailor. His relation as natural guardian is referred to merely as showing that in the very nature of things on the record before us there will be no claim of the true owner to trouble defendants. Whether the plaintiff was the owner of the piano at the time defendants contracted with him was then wholly immaterial. If the jury found the other facts required by the instruction complained of, the verdict should have been for the plaintiff whether ownership in the plaintiff was or was not found to have existed at the time he delivered the piano to defendants. The instruction was erroneous in that it required the jury to find a fact which was not essential to the plaintiff's right of recovery. But the finding of this fact in no way prejudiced the defendant, and constitutes no just ground for complaint. [LaForce v. The William City Insurance Co., 43 Mo. App. 518, 533.] This assignment of error is ruled against the defendants.

II. Defendants further contend that the court erred in giving the plaintiff's second instruction, assert-

ing that the first and second branches of said instruction find no support in the evidence.

We have examined the record carefully and find no evidence tending to show what loss the plaintiff suffered by being deprived of the use of the piano while it was being repaired, and therefore, it is true that the second branch of said instruction finds no support in the evidence. As it is a familiar rule of law that damages of this kind must be established by proof, the instruction was erroneous in the respect mentioned. [Hoffman v. Railway, 51 Mo. App. 273, 279.] In this view it is not necessary to determine whether the first branch of the instruction is based upon any evidence. Suffice to say it is impossible to tell from reading the record what damages the jury allowed under the first branch and what they allowed under the second branch. The error as to the second branch of the instruction would necessarily lead to the reversal of the judgment and a remanding of the cause if it were not that the proof of the expense plaintiff was put to for repairs is uniform and exact, and the branch of the instruction referring to that was correct. The expense so shown was forty dollars and we may order the excess, sixty dollars, remitted from the verdict. If remitted within ten days from the filing of this opinion the judgment will be affirmed for the residue of forty dollars, with the costs of the appeal adjudged against the plaintiff; otherwise the judgment will be reversed, and the cause remanded.

Reynolds, P. J., and Nortoni, J., concur.

ANNA EVES, Appellant, v. SOVEREIGN CAMP,
WOODMEN OF THE WORLD, Defendant, and
ADELIA KERLS (Interpleader), Respondent and
VERNETTA EVES, Interpleader.

St. Louis Court of Appeals, December 30, 1910.

1. **FRATERNAL BENEFICIARY ASSOCIATIONS: Change of Beneficiary.** The insured in a certificate issued by a fraternal beneficiary association may change the beneficiary without the consent of the latter, in the absence of prohibition by statute, or by the charter or by-laws of the association, or by the terms of the certificate.
2. **LIFE INSURANCE: Policy for Benefit of Married Women: Statutes: Not Retrospective in Operation.** The amendments changing section 5854, Revised Statutes 1889, to the form in which it appears as section 6944, Revised Statutes 1909 are not retrospective in their operation.
3. ———: ———: **Statute Construed.** Under section 5854, Revised Statutes 1889, where no power of divestiture is reserved, the wife and children of insured, named as beneficiaries in a life insurance policy, have a vested right therein.
4. **FRATERNAL BENEFICIARY ASSOCIATIONS: Policy for Benefit of Married Women: Statute Construed.** Under section 5854, Revised Statutes 1889, where no power of divestiture is reserved to a member of a beneficiary association by the constitution or laws of the association or by the terms of the certificate, there would seem to be no reason for holding that the wife and children of such member, named in the certificate as beneficiaries, would not have a vested right therein.
5. **LIFE INSURANCE: Policy for Benefit of Married Women: Statute: Construction.** In determining whether section 5854, Revised Statutes 1889 makes a policy of life insurance inure to the wife, subject to such power of divestiture or substitution as may be contained in the contract, or whether it denies the right to reserve such power, it is the duty of the courts to uphold the contract, if it can be done, and effect still be given to the law, as courts will not abridge the freedom of contract without cause.
6. ———: ———: **Change of Beneficiary: Statute Construed.** Section 5854, Revised Statutes 1889, declaring that "any policy of insurance made by any insurance company on the life of any person, expressed to be for the benefit of any mar-

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ried woman shall inure to her separate use and benefit" leaves the parties to a life insurance policy free to contract as they please in regard to the beneficiary and the quality of her interest, and does not deny the right to reserve in the policy the power to revoke the rights of the wife as beneficiary and substitute another in her stead.

7. **FRATERNAL BENEFICIARY ASSOCIATIONS: Policy for Benefit of Married Women: Change of Beneficiary: Statute.** Even if section 5854, Revised Statutes 1889 is applicable to a certificate issued by a fraternal beneficiary association because it was issued before the association qualified to do business under Acts of 1897, page 132, it does not prevent the member changing the beneficiary from his wife to his sister, where the constitution and by-laws of the association, made part of the certificate, provide that a member may make such a change; said section not denying the right to reserve in the certificate the power to change the beneficiary from the wife to another person.
8. **BILL OF INTERPLEADER: Costs: Discretion of Court: Appellate Practice: Fraternal Beneficiary Associations.** Where, in a suit on a benefit certificate issued by a fraternal beneficiary association, the claimant of the benefit, as a substituted beneficiary, is required to interplead, and the suit proceeds between plaintiff and the interpleader, the taxation of the cost of the suit against the fund, instead of against plaintiff, on judgment being rendered for the interpleader, was a matter within the sound discretion of the trial court, with the exercise of which the appellate court will not interfere.

Appeal from St. Louis City Circuit Court.—*Hon. Matt G. Reynolds*, Judge.

AFFIRMED.

Charles Fensky for appellant.

If, as a matter of law, said original policy wherein plaintiff, Anna Eves, wife of the insured, was named as beneficiary, and dated August 26, 1897, is governed by the general insurance laws, because said Sovereign Camp, Woodmen of the World, at the time of the issuance of said policy was doing business in this state and had not qualified nor taken out a permit to do business in this state as a fraternal benefit society so as to ex-

empt said order and its policies from the provisions of general insurance laws, plaintiff, Anna Eves, remained the wife of said Theodore Eves up to the date of his death, then said policy could not be cancelled nor the beneficiary therein changed by any act of her husband or the defendant order under sec. 7895, Rev. Stat. 1899. *United States Casualty Co. v. Kacer*, 169 Mo. 313; *Gruwell v. Ins. Co.*, 126 Mo. App. 501; *Schmidt v. Ins. Co.*, 129 S. W. 660.

Wm. L. Bohnenkamp for respondent.

(1) It is universally held that the beneficiary in a fraternal benefit certificate has no vested interest therein. *Masonic Ben. Ass'n v. Bunch*, 109 Mo. 579; *Wells v. Mut. Ben. Ass'n*, 126 Mo. 637; *Hoffman v. Grand Lodge B. L. F.*, 73 Mo. App. 47; *Grand Lodge A. O. U. W. v. Reneau*, 75 Mo. App. 402; *Sup. Council L. of H. v. Neidlet*, 81 Mo. App. 598; *Morton v. Royal Tribe of Joseph*, 93 Mo. App. 78; *Carpenter v. Knapp*, 105 Iowa 712; s. c., 38 L. R. A. 128; *Shipman v. Protective Ass'n*, 174 N. Y. 398; *Westerman v. Supreme Lodge K. of P.*, 196 Mo. 739; *Dennis v. Lodge*, 119 Mo. App. 1. c. 218; *Grand Lodge Lodge v. O'Malley*, 114 Mo. App. 1. c. 201; s. c., 213 Mo. 1. c. 284; *Keene v. A. O. U. W.*, 38 Mo. App. 543; *Relief Ass'n v. Strode*, 103 Mo. App. 694; *Order of Ry. Conductors v. Koster*, 55 Mo. App. 186; *Expressman's Aid Soc. v. Lewis*, 9 Mo. App. 416; *Hoelt v. Supreme Lodge Knights of Honor*, 113 Cal. 96, 33 L. R. A. 174. (2) It is mandatory upon the court to tax the costs against the losing party. *R. S. 1899*, sec. 1547; *R. S. 1899*, secs. 1549 and 1550; *Minor v. Garhart*, 122 Mo. App. 124; *Hawkins v. Nowland*, 53 Mo. 328; *Dupont v. McLaren*, 61 Mo. 511; *Bender v. Zimmerman*, 135 Mo. 58; *Turner v. Johnson*, 95 Mo. 452; *Schumacher v. Mehlberg*, 96 Mo. App. 598; *Minor v. Garhart*, 122 Mo. App. 124; *Bender v. Zimmerman*, 135 Mo. 58; *Turner v. Johnson*, 95 Mo. 431; *Bobb v.*

Wolff, 54 Mo. App. 515; Plant Seed Co. v. Mitchell Seed Co., 37 Mo. App. 313. (3) Although the costs, including an attorney's fee in an interpleader suit brought by a beneficiary association, are first taxed against the fund which was paid into court by such association, in the end, the whole costs, including that taken out of the fund for the plaintiff association, will be charged against the party whose invalid claim caused the proceeding to be instituted. Woodmen of the World v. Wood, 100 Mo. App. 659; Woodmen of the World v. Wood, 114 Mo. App. 479.

STATEMENT.—This action originated as a suit brought by the plaintiff against the defendant, Sovereign Camp, Woodmen of the World, to recover two thousand dollars upon a benefit certificate. The defendant filed an answer in the nature of a bill of interpleader, and on leave and by consent paid into court nineteen hundred dollars, which was the amount of the certificate less one hundred dollars allowed it for counsel fees. An order was made requiring the claimants, Adelia Kerls and Vernetta Eves to interplead, which they did, the latter by Franklin Miller, her guardian *ad litem*.

A trial being had, the court, having heard the evidence, made and entered its decree, adjudging and decreeing that neither Anna Eves nor Vernetta Eves was entitled to anything on account of said certificate or from the funds deposited in court, and dismissing their interpleas. The court further by said decree ordered that the costs of the proceedings, including a fee of fifty dollars to Franklin Miller, Esq. for services as guardian *ad litem* of Vernetta Eves, be paid out of said fund, and that the balance of said fund be paid by the clerk to Adelia Kerls.

From said judgment and decree, the plaintiff, Anna Eves, after unsuccessfully moving for a new trial and in arrest, has duly prosecuted her appeal to this court.

Interpleader Adelia Kerls is also here on cross-appeal from the action of the trial court in refusing to modify the decree so as to tax the costs against the plaintiff instead of taxing them against the fund.

The conceded facts in the case may be stated as follows: On August 26, 1897, there was executed by Sovereign Camp, Woodmen of the World, and delivered through one of its subordinate lodges located at St. Louis, Missouri, to Theodore Eves, then a member of said lodge, a beneficiary certificate which stated that said Eves "is, while in good standing as a member of this fraternity entitled to participate in its beneficiary fund to the amount of two thousand dollars payable at his death to his wife, Anna Eves, by this sovereign camp. This certificate is issued and accepted subject to the conditions on the back hereof, and those named in the constitution and laws of this fraternity." On the back of said certificate there was a blank form for changing the beneficiary.

The constitution, and laws of said sovereign camp provided that the beneficiary or beneficiaries might be, among others, the member's wife, sister or daughter. They also contained the following provisions:

"Sec. 64. Should a member desire to change his beneficiary or beneficiaries, he may do so upon payment to the sovereign camp of a fee of twenty-five cents, which sum, together with his certificate, he shall forward to the sovereign clerk with his request written on the back of his certificate, giving the name or names of such new beneficiary or beneficiaries, and upon receipt thereof the sovereign clerk shall issue and return a new certificate, subject to the same conditions and rate as the one surrendered, which conditions shall be a part of the new certificate, in which he shall write the name or names of the new beneficiary, or beneficiaries and shall record said change in the proper books of the sovereign camp.

"Sec. 69. The constitution and laws of the sovereign camp of the Woodmen of the World now in force, or which may hereafter be enacted, by-laws of the camp now in force, or which may be hereafter enacted, the application and certificate shall constitute a part of the beneficiary contract between the order and the member."

On July 21, 1906, said certificate was endorsed and cancelled by Theodore Eves and returned to said order with direction from him that another certificate issue in lieu thereof, in which shall be named as beneficiary his sister, Adelia Kerls, for fifteen hundred dollars thereof, and his daughter, Vernetta Eves, for five hundred dollars thereof. Said request for change of beneficiary was in accord with the laws of the order. On August 31, 1906, certificate was issued to said Theodore Eves in lieu of that cancelled, in which was named his said sister and daughter as beneficiaries for the amounts as requested by said Eves, and in other respects like to that first issued. On September 4, 1907, said Theodore Eves duly endorsed and cancelled the last named certificate, and requested of said order that another be issued in lieu thereof and the sole and only beneficiary named therein to be his sister, Adelia Kerls, for said sum of two thousand dollars and on the tenth day of September, 1907, a certificate was executed by the sovereign camp of said order containing such change of beneficiary and in other respects like that last cancelled, and delivered to the local camp at St. Louis, which countersigned it on the sixteenth day of said month; and that prior thereto, and on the fourteenth day of said month, said Theodore Eves died.

At and prior to the issuance of the first certificate in August, 1897, and ever since that time, said sovereign camp has been a purely fraternal beneficiary association in every sense, as distinguished from an ordinary life insurance company, and was organized and existed under the laws of the State of Nebraska.

At the time the first certificate was issued the act concerning fraternal beneficiary associations, approved March 16, 1897, was in force but said sovereign camp had not qualified thereunder. It did so qualify on November 2, 1897.

Of its own motion the court embodied conclusions of law in its decree as follows:

"That Anna Eves, the beneficiary in the certificate issued on the life of Theodore Eves on August 26, 1897, although the Sovereign Camp Woodmen of the World had not qualified under or received permission to do business in this state under the provisions of the Act of 1897, had no vested interest in said certificate or in the benefits provided thereby which her husband, Theodore Eves, could not change without her consent and that the change of the beneficiary therein by Theodore Eves without the consent of Anna Eves to Adelia Kerls and Vernetta Eves was perfectly lawful and permissible.

"That the change of the beneficiary by Theodore Eves from Adelia Kerls and Vernetta Eves to Adelia Kerls without their consent was perfectly lawful and permissible and that at the time of the death of Theodore Eves on September 14th, 1907, the certificate or obligation to Adelia Kerls as the beneficiary was lawful and binding upon all parties to this action and that Adelia Kerls then was, and now is, entitled to the proceeds provided to be paid the beneficiary therein."

CAULFIELD, J. (after stating the facts).—Plaintiff has raised a number of questions upon appeal but they all finally resolve themselves into one: Did Theodore Eves have the power to change the beneficiary in his benefit certificate so as to substitute Adelia Kerls for the plaintiff? If he did, then the judgment of the trial court should be affirmed as to plaintiff. If he did not, then the court erred in its conclusions of law and the judgment should be reversed and the cause remanded.

It is clear that without some statutory provision to the contrary Theodore Eves had the power mentioned.

In the case of Grand Lodge A. O. U. W. v. McFadden, 213 Mo. at page 284, 111 S. W. 1172, the court said:

"It is the universal law that a beneficiary named in a fraternal benefit certificate has no vested interest therein (and cases cited). The designation of the beneficiary in a certificate issued by a fraternal beneficiary association is but a present expression of the member's will, revocable at any time, and unless there is to be found, either in the laws of the state where the association was incorporated or in its charter or by-laws or in the terms of the certificate itself, some provision prohibiting or restraining the right of the member to change the name of the beneficiary, he may do so with the same freedom as he may change the name of a legatee in his will by the making of a new will before the first one takes effect; provided, that where the rules and regulations of the association provide a specific method of changing the name of the beneficiary, such rules and regulations must be substantially complied with in order to effect a new designation. The laws of the association read in evidence expressly provide for the making of a new designation."

In the case at bar there does not appear to be found "either in the laws of the state where the association was incorporated or in its charter or by-laws or in the terms of the certificate itself," any "provisions prohibiting or restraining the right of the member to change the name of the beneficiary." The rules and regulations of the association providing the method of changing the name have been complied with, and "the laws of the association read in evidence expressly provide for the making of a new designation."

Plaintiff's counsel concedes the foregoing, but asserts that having issued the certificate in question, while the Act of 1897 was in force, without having qual-

ified to do business under it, the defendant association was not exempt from, but was subject to, the provisions of the general insurance statutes relating to old line insurance policies just the same as if it were an ordinary insurance company and the benefit certificate an ordinary insurance policy, citing *Gruwell v. Knights and Ladies of Security*, 126 Mo. App. 501, 104 S. W. 884, and other cases. He then asserts that by section 7895 of the Revised Statutes of 1899, now section 6944, Revised Statutes of 1909, plaintiff became vested at the time of its issuance with an absolute, unconditional, indefeasible interest in the benefit certificate and all moneys represented thereby, which could not be divested or affected by the member, Theodore Eves, changing the beneficiary. Upon the proper answer to this last assertion this case depends.

If said section affects this case it will do so in the form it was in when this certificate issued, August 26, 1897. The amendments changing the section to its present form are not retrospective in their operation. [*Blum v. New York Life Ins. Co.*, 197 Mo. 514, 523, 95 S. W. 317.] Said section was then section 5854, Revised Statutes 1889 as follows:

"Section 5854. Policy for Benefit of Married Women.—Any policy of insurance heretofore or hereafter made by any insurance company on the life of any person, expressed to be for the benefit of any married woman, whether the same be effected by herself or by her husband, or by any third person in her behalf, shall inure to her separate use and benefit, and that of her children, if any, independently of her husband and of his creditors and representatives, and also independently of such third person effecting the same in her behalf, his creditors and representatives; and a trustee may be appointed by the circuit court for the county in which such married woman resides, to hold and manage the interest of any married woman in such policy, or the proceeds thereof. In the event of the death of

such married woman before her husband, the said policy shall inure to the children of such marriage, to the exclusion of creditors and executors and administrators of said husband, any technical words or phrases in the policy to the contrary notwithstanding."

Now as to an ordinary life insurance policy, where no power of divestiture is reserved, there is no doubt that under this statute the wife and children upon the issue of the policy would have a vested right therein. [Blum v. New York Life Ins. Co., supra.]

And there would seem no reason for applying any different rule as to a beneficiary certificate where no power of divestiture is reserved to the member by the constitution, or by the laws of the association or by the terms of the certificate. [Bacon, Benefit Societies and Life Insurance (3 Ed.), sec. 304, vol. 1.]

In the case at bar, the right to change the beneficiary is given by the constitution and laws of the order and forms part of the contract under which plaintiff must claim. The right to reserve such power of divestiture is complete and unrestricted unless the statute forbids it. It would seem then that the case resolves itself into this: Does the statute relied upon by plaintiff make the policy or certificate inure to the wife as it is written, that is, subject to such power of divestiture or substitution as may be contained in the contract, or does the statute deny the right to reserve such power? In determining this question it is our duty to uphold the contract if we can do so and still give effect to the law, as courts will not abridge the freedom of contract without cause. [Price v. Connecticut Mutual Life Ins. Co., 48 Mo. App. 281, 295].

Now when we turn to the section under discussion we do not find any language calculated to abridge the freedom of the insurer and insured to make their contract of insurance as they see fit; neither does plaintiff's counsel attempt to guide us to any such language. The language used is, "Any policy of insurance here-

tofore or hereafter made by any insurance company on the life of any person, expressed to be for the benefit of any married woman . . . shall inure to her separate use and benefit." It is the *policy*, as it may have been or may be made by the insurance company, that inures. There is no attempt disclosed to vary the terms of the contract of insurance or to derogate from the right to contract freely with regard to the beneficiary. On the contrary, before the policy inures it must be *expressed* to be for the benefit of the married woman. That is, the insured and insurer must first of their own free will make their contract so that it will be expressed to be for her benefit. They may omit her altogether if they desire; or they may give her an interest only in common with others. Their power in that respect is left general and unrestricted. Being so, it includes the power to make a qualified appointment and to reserve the power to revoke and to substitute. [Am. and Eng. Ency. of Law (2 Ed.), vol. 22, p. 1138; Bacon, section 290, 291.]

It is significant, as bearing upon the proper construction to be given this section of the statutes, that out of all the decisions holding unanimously that a beneficiary in a fraternal beneficiary certificate may be changed at the will of the member, no case has been brought to our attention placing the decision upon the ground that the association had been exempted by statute from the operation of the general insurance laws. Nor out of all the very numerous cases holding that the beneficiary has a vested interest in an old line policy, has our attention been called to any so holding, where the policy reserved the right to change the beneficiary.

And our Supreme Court has said that the doctrine that the beneficiary in a benefit certificate may be changed is predicated upon the *form of the benefit certificate*. [Westerman v. Supreme Lodge K. of P., 196

Mo. l. c. 737, 94 S. W. 470.] In that case the court used this somewhat significant language:

"It is clear, under the well settled law of this state, that plaintiff had no vested right in the benefit certificate in suit at the time of the passage of the Act of 1897. This was expressly decided in *Masonic Ben. Assn. v. Bunch*, 109 Mo. 560, 19 S. W. 25, and in that case the certificate involved was issued by a foreign benevolent association prior to the Act of 1881, which is referred to in the case of *Kern v. Legion of Honor*, 167 Mo. 471, 67 S. W. 252, and which authorized fraternal associations to do business in this state and exempted them from the general insurance laws. Hence, we take it that the doctrine announced in the *Bunch* case was predicated upon the form of the benefit certificate."

We have also found that the following Missouri cases, which state the proposition that the beneficiary in an ordinary life insurance policy takes a vested, indefeasible interest, state it with the qualification, "where no power of divestiture is reserved:" *Blum v. New York Life Ins. Co.*, 197 Mo. 513, 523, 95 S. W. 317; *United States Casualty Co. v. Kacer*, 169 Mo. 301, 313, 315, 69 S. W. 370; *Diehm v. North Western Mut. Life Ins. Co.*, 129 Mo. App. 256, 261, 108 S. W. 139.

We do not regard the cases cited by the plaintiff and holding that the suicide statute is binding against fraternal associations which had not qualified under the Act of 1897 as being any guide to us in this case. That statute provides that "it shall be no defense that the insured committed suicide, . . . and any stipulation in the policy to the contrary shall be void." The section we are considering does not provide that it shall be no defense that the insured has changed the beneficiary and that any reservation in the policy of the right to make such change shall be void. There is no discoverable analogy between the sections.

We have no hesitation in holding that this statute has left the parties free to contract as they pleased in

regard to the beneficiary and the quality of her interest; and that the policy inured to her only as it was made, in this case subject to the right of the member to change the beneficiary. It follows that the plaintiff's interest and that of Vernetta Eves were extinguished by the changes of beneficiaries effected by the member and that the court was right in holding that Adelia Kerls alone was entitled at the time the member died.

As to the question raised by the cross-appeal of interpleader Kerls, the taxation of costs in this proceeding was a matter within the sound discretion of the trial court, with the exercise of which we see no reason to interfere. [Supreme Council Legion of Honor v. Nidelet, 85 Mo. App. 283, 284.]

The judgment of the circuit court is affirmed. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

FRANCIS HEMM, Appellant, v. RICHARD F.
JUEDE, Respondent.

St. Louis Court of Appeals, December 30, 1910.

1. **APPELLATE PRACTICE: Motion for New Trial: No Exception to Order Overruling.** Where no exception is preserved to the overruling of the motion for a new trial, the case stands on appeal as though a motion for a new trial had not been made.
2. **————: Motions after Final Judgment: Review: Motion for New Trial not Necessary: Bill of Exceptions Necessary.** The rulings of the trial court on motions made after final judgment, such as motions to quash an execution, pay over money on execution, set aside a judgment for irregularity, set aside an execution sale, and the like, are reviewable on appeal without motion for rehearing or new trial, and the fact that the judgment entered in the case does not affirmatively show the ground of the court's judgment, or that evidence was taken on the motion, does not change the rule, but, under such circumstances, a bill of exceptions is necessary to advise the appellate court of the nature of the motion and the evidence adduced.

3. ———: ———: **Independent Proceeding: Motion for New Trial Necessary.** A ruling on a motion which is treated as an independent proceeding is not reviewable on appeal, in the absence of a motion for new trial.
4. **JUDGMENTS: Final Judgment: Dissolution of Partnership.** A decree dissolving a partnership and appointing a receiver to distribute the assets is a final decree, and leaves nothing to do but to execute it by administering the partnership estate.
5. **APPELLATE PRACTICE: Motion After Final Judgment: Prayer for Distribution of Funds of Dissolved Partnership: Motion for New Trial not Necessary.** In an action for the dissolution of a partnership, where the final decree directed the receiver to distribute the proceeds of the firm's assets equally between two partners, a motion by the trustee in bankruptcy of one of the partners, filed after the rendition of said decree, praying for an order directing the receiver to turn over to the trustee the bankrupt's share of the dissolved partnership assets, is not the commencement of an independent proceeding, as the trustee merely stands in the place of the bankrupt, and the ruling on such motion is reviewable on appeal although no motion for a new trial thereon was filed.
6. **PARTNERSHIP: Firm Assets: Rights of Partners.** In order to discharge himself from the liabilities to which he may be subject as a partner, a member of a firm has the right to have the partnership property applied in payment of the firm's debts, and this right exists not only against his partner but against all persons claiming through him, including his trustee in bankruptcy.
7. ———: ———: **Distribution.** Where the partners are in possession and control of the firm's property, they may make any honest disposition of it, and each may waive his equitable right to have it applied to the payment of firm debts, and consent to the application thereof to the payment of a partner's individual debts.
8. ———: ———: ———: **Rights of Partners: Administration of Estate by Court.** The court, in the administration of a partnership estate in a suit for the dissolution of the firm and the distribution of its estate, must apply the firm's assets to the satisfaction of the firm's creditors, to the exclusion of the individual creditors of the individual partners.
9. ———: ———: ———: ———: ———: **Facts Stated.** In an action by a partner for dissolution of the partnership and division of the assets between him and his co-partner, after payment of the firm's debts, a decree dissolving the firm and appointing a receiver to distribute the proceeds of

Hemm v. Juede.

its assets equally between the partners, after deducting the cost of the proceeding, rendered on a stipulation permitting the appointment of a receiver to take charge of and dispose of the firm's assets and to report to the court from time to time, is not inconsistent with the idea that if partnership creditors presented claims before the funds were distributed, they should be paid; and while the funds are in the custody of the court, subject to its proper orders, the partner suing for the dissolution of the firm and the appointment of a receiver has not waived or lost his equitable right to have the firm's assets applied to the payment of the firm debts, and so long as there is any probability that a claim may be upheld as a firm liability, the court may not order the receiver to pay over to the trustee in bankruptcy of the copartner the share of the copartner in the firm's assets.

Appeal from St. Louis City Circuit Court.—*Hon. Moses N. Sale*, Judge.

REVERSED AND REMANDED (*with directions*).

Taylor R. Young and *Daniel Dillon* for appellant.

(1) A partnership is liable for the negligence of any one of the partners in carrying on the partnership business. The authorities are all agreed on this proposition. *Dudley v. Love*, 60 Mo. App. 420; *Wilson O'bear Gro. Co. v. Cole*, 26 Mo. App. 5; *Parsons on Partnership* (4 Ed.), sec. 105 and note sec. 100 and notes; *Story on Partnership* (7 Ed.), secs. 166, 167; *Lindly on Partnership* (7 Ed.), p. 174; *Shumaker on Partnership*, pp. 310, 311, 312, and cases cited and notes; 1 *Cooley on Torts* (3 Ed.), p. 253 and note 28; *Hoss v. Lawry*, 122 Ind. 225; *Hyme v. Erwin*, 23 A. C. 226. (2) When a partnership becomes insolvent or goes into bankruptcy, those having claims against the partnership have a priority as against the assets of the partnership over those having claims against the individual members of the partnership. All authorities are agreed on this point. In fact, it is elementary. *Parson's on Partnership* (4 Ed.), sec. 382; *Shumaker on Partnership*, pp. 354-358; *Hundly v. Faris*, 103 Mo. 79; *Phelps v. McNelly*, 66 Mo. 558; *Ault v. Bradley*, 191

Mo. 731. (3) Appellant Hemm, being a member of the firm of Hemm & Juede had the right to have the partnership assets applied to the payment of partnership liabilities. Phelps v. McNelly, 66 Mo. 554; Shackelford's Admr. v. Clark, 78 Mo. 492; Blake v. Bank, 219 Mo. 658; Lindley on Partnership (7 Ed.), 1905, p. 387; George on Partnership, p. 180; Shumaker on Partnership, pp. 354-356.

Buder & Buder for respondent; *Byron F. Babbitt* for respondent, trustee in bankruptcy.

(1) The appeal in this case is from the judgment of the trial court upon the intervening petition of C. Wm. Koenig, trustee in bankruptcy of Richard F. Juede, and from that judgment alone. The appellant filed a motion for new trial upon that judgment, but failed to save an exception to the action of the trial court in overruling the same. Hence there is nothing before this court for review. Abstract pp. 40 and 105; Parsons v. Clark, 98 Mo. App. 28; Bates v. Realty Co., 88 Mo. App. 550; Reynolds v. Railroad, 146 Mo. 126; Sicher v. Rambausek, 193 Mo. 113; Casler v. Chase, 160 Mo. 418; State v. Miller, 189 Mo. 673. (2) After an order of distribution the money in the hands of the receiver must be considered the separate property of the distributee. Richards v. Griggs, 16 Mo. 416; Kiernan v. Robertson, 116 Mo. App. 56. (3) Partnership creditors have no lien on the partnership property any more than an individual creditor has upon the individual property of the debtor. Partners have a lien which is worked out on an implied agreement that partnership assets are to be appropriated for partnership debts, but this lien can be and is easily waived by the action of the partners. In re Langmead's Trust, 7th De. Gex. M. & G. Reports, 353; Lingen v. Simpson, 1 Simmon & Stuart's Reports, 600; Giddings v. Palmer, 107 Mass. 269; Hapgod v. Cornwell, 48 Ill. 64; Robert-

son v. Baker, 11 Fla. 192; Hart v. Clark, 54 Ala. 490; Andrews v. Mann, 31 Miss. 322; Ex parte Ruffin, 6 Vesey 119; Ex. Parte Walker, 4 De. Gex. F. & J. Reports, 509; Holroyd v. Griffiths, 3 Drew 428. (4) And where the partners are not in position to enforce the lien the firm creditors cannot. Case v. Beauregard, 99 U. S. 119; Rice v. Barnard, 20 Vt. 479; York County Bank's Appeal, 32 Pa. St. 446; Lefevre's Appeal, 69 Pa. St. 129; Baker's Appeal, 21 Pa. St. 76; Robb v. Stevens, Clark Ch. Cases (N. Y.) 191; Sage v. Chollar, 21 Barb. (N.Y.) 596. (5) Joint but not partnership creditors cannot claim this priority, for a partner's lien upon which this equity rests does not extend to such debts. Turner v. Jaycox, 40 N. Y. 470; Forsyth v. Woods, 11 Wallace, 78 U. S. 484. (6) Under the Bankruptcy Act the rights of Mr. Juede's trustee in bankruptcy attached to the fund in controversy as of the date of Jude's adjudication in bankruptcy, to-wit, as of January 16, 1909. Natl. Bankruptcy Act, sec. 70a.

STATEMENT.—Appeal by plaintiff from the action of the circuit court of the City of St. Louis in sustaining the intervening petition filed by the trustee in bankruptcy of the defendant.

The facts in the case are undisputed. From August 31, 1907 to July 20, 1908, Francis Hemm and Richard F. Juede were in partnership carrying on a retail drug business in the city of St. Louis. On July 15, 1908, one George B. Riefling commenced suit against Juede in the circuit court of said city to recover damages for personal injuries alleged to have been sustained through the negligence of Juede, acting as a member of said firm, in compounding and filling a physician's prescription. On July 20, 1908, Hemm brought this action praying for the dissolution of the partnership, the appointment of a receiver and the division between the parties of the partnership assets after payment of the

partnership debts. On August 3, 1908, defendant entered his appearance to the June term, 1908, and by consent of both parties the court set said cause down for immediate hearing on its merits; defendant filed an answer and cross-bill praying that the bill of plaintiff be dismissed, the partnership dissolved and a receiver appointed to dispose of the assets and distribute the proceeds. On the same day a stipulation between the parties was filed in the cause as follows:

"Cause submitted. Decree of dissolution on defendant's cross-bill and Theodore Hemmelmann, Jr., appointed receiver without bond to take charge of and dispose of assets and to report to court from time to time."

The court on said 3d day of August, 1908, entered a decree as follows:

"Now on this day comes the plaintiff by Taylor R. Young, his attorney, and comes the defendant by Messers. Buder & Buder, his attorneys, and the parties hereto having entered their respective appearances to the June term, 1908, and consenting to an immediate setting and hearing in said cause on defendant's cross-bill, plaintiff having heretofore dismissed his bill, the court thereupon proceeds to hear the evidence and proof adduced by the parties, and being fully advised of and concerning the premises, doth find in favor of the defendant on the issues herein joined.

"It is therefore adjudged, ordered and decreed that the partnership heretofore known as Hemm & Juede, and engaged in conducting a retail drug business at 3100 South Grand avenue in the city of St. Louis, be, and the same hereby is dissolved and that for the purpose of the distribution of the assets, doth hereby appoint Theodore Hemmelmann, Jr., receiver, without bond, to take charge and dispose of the assets, including the leasehold mentioned in the cross-bill herein, at public or private sale, in bulk, for cash, to the highest and best bidder thereof subject to the approval of the court, however, and to distribute the proceeds of such sale, after deducting the

costs of this proceeding, equally between the parties plaintiff and defendant."

On September 26, 1908, the receiver filed in the cause a report showing that he had turned the partnership assets into cash and after paying the expense of the receivership and the claimants of sundry creditors and deducting his agreed fee of two hundred dollars and making unequal advancements to Messers. Juede and Hemm, he still had a balance due Juede of \$3295.28 and a balance due Francis Hemm of \$3157.10. On September 30, 1908, Riefling filed an amended petition in the damage suit making the plaintiff and defendant herein, Juede and Hemm, doing business under the style and firm name of Hemm & Juede, parties defendant. And thereafter on the same day he filed a motion in this action praying leave to join the receiver as party defendant in the damage suit. On January 18, 1909, defendant Juede was adjudicated a bankrupt by the District Court of the United States within and for the Eastern Division of the Eastern Judicial District of Missouri. On February 2, 1909, plaintiff filed a motion in this cause praying the continuance of the receivership and that no order of distribution in this cause be made until such time as the damage suit was finally determined. On the same day C. William Koenig, who had in the meantime been duly appointed and qualified as trustee in bankruptcy of defendant Juede, appeared and filed in this cause his petition for an order on the receiver to turn over to him as such trustee the sum of \$3295.28 as the share of Juede in the fund realized out of the partnership assets and shown by the report to be in the hands of the receiver. On February 4, 1909, the motion of Riefling for leave to sue the receiver and the motion of plaintiff to continue the receivership, etc., and the petition of said trustee in bankruptcy were submitted to the court by consent on certain evidence and admissions, including the files in the damage suit, and a petition which had been filed by Francis Hemm

in the bankruptcy proceeding asking the bankruptcy court to refrain from taking hold of the partnership assets until the partnership liabilities were settled and the state court ordered distribution.

The evidence tended to show, among other things, that the damage suit was well founded and that the personal injuries sought to be recovered for therein were very severe and were due to Juede's negligence while acting in the partnership business, in filling a prescription for Riefing, and that the amount sought to be recovered by Riefing was ten thousand dollars. On July 6, 1909, the court overruled the motion of plaintiff to continue the receivership, etc.; overruled the motion and petition of the said Riefing for leave to sue the receiver, and sustained said motion of C. William Koenig, trustee in bankruptcy of the estate of Richard F. Juede, and ordered the receiver to turn over to the said trustee in bankruptcy the sum of thirty-two hundred, ninety-five dollars and twenty-eight cents less one-half of the court costs. To which rulings and orders of the court and each of them the plaintiff then and there excepted, saved his exceptions and still excepts. In due time the plaintiff filed a motion for a new trial, and on July 19, 1909, the court overruled the motion, but the plaintiff did not save any exceptions to the action of the court in so doing. He did, however, duly preserve and make part of the record in this cause the petition of the trustee in bankruptcy and the action of the court thereon and the evidence upon which such action was based, by proper bill of exceptions, and has duly prosecuted his appeal to this court from the judgment of the circuit court sustaining the said petition of the trustee in bankruptcy.

CAULFIELD, J. (after stating the facts).—I. We are met in the beginning by the fact that plaintiff preserved no exception to the action of the trial court in overruling his motion for a new trial. The case must

stand then as if there was no motion for a new trial; and we cannot review the court's action in sustaining the petition of the trustee in bankruptcy if the error assigned should have been brought to the attention of the trial court by such a motion. [Kolokas v. R. R. Co., 223 Mo. 455, 122 S. W. 1082.] But we are convinced that the assignment of error we are called upon to review is not in that predicament. From an early day it has been uniformly held that for all the purposes of a review in this court the rulings of the trial court on motions made after final judgment stand on a different footing from those made during the progress of the cause. This court will review the action of the lower court on a motion to quash an execution, pay over money on execution, set aside a judgment for irregularity, set aside execution sale and the like, though there is no motion for a rehearing or new trial. A motion for a new trial is unnecessary in such cases. [City of St. Louis v. Brooks, 107 Mo. 380, 383, 18 S. W. 22.] And it does not change the rule that the judgment entered in the case does not affirmatively show the ground of the court's judgment, or that evidence was taken on the motion. Such circumstances merely necessitate a bill of exceptions in order to advise this court of the nature of the motion and the evidence adduced. It does not necessitate a motion for a new trial. [City v. Brooks, *supra*; Aultman v. Daggs, 50 Mo. App. 281.]

But there is another class of motions which are treated as independent proceedings, where a motion for a new trial is required in order to authorize a review by us. [Lilly v. Menke, 92 Mo. App. 354, 358.]

In *Erskine v. Lowenstein*, 82 Mo. 305, which was a motion for judgment against a stockholder of an insolvent company it was held that it took the place under the statute, of a suit in equity; and in *Steele v. Steele*, 85 Mo. App. 224 on a motion for alimony, the court ruled that a motion for a new trial was necessary in order to have a review of the facts on appeal. In

such cases a motion is akin to a petition in an original cause and really begins a new proceeding. It is proper therefore that the same rule in regard to moving for a new trial should apply to such a motion as would be applied to any original independent cause. Such would probably also be the rule in an interpleader upon attachment or where a third person intervenes, claiming property or money in the custody of the court adverse to the parties.

The paper filed by the trustee in bankruptcy in the case at bar, while taking the form of an intervening petition, is in effect nothing more than a motion, and it is undoubtedly a motion filed after final judgment. The decree of August 30, 1908, dissolving the partnership, appointing the receiver, etc., was a final decree and left nothing to do but execute it by administering the estate. [State ex rel. v. Woodson, 161 Mo. 444, 453, 61 S. W. 252; Shulte v. Hoffman, 18 Texas 678.] The motion of the trustee came after that and we do not consider its filing the commencement of an independent proceeding in the sense we are discussing. The trustee merely stood in the shoes of the bankrupt and could have asserted no right except such as he derived from the bankrupt defendant. No new issue and no new right was asserted by his intervening petition. He was necessarily limited in his requests to what the bankrupt partner was entitled to. We see no material distinction between the action of the court in sustaining such a motion and the action of the court in sustaining a motion to quash an execution and ordering the sheriff to pay over money in his hands to the defendant, as was done in Slagel v. Murdock, 65 Mo. 522, where it was held that a motion for a new trial was unnecessary.

We will then review the trial court's action in sustaining said petition.

II. In order to discharge himself from the liabilities to which he may be subject as partner, a member

of a firm has a right to have the partnership property applied in payment of the debts and liabilities of the firm. [Rock Island Imp. Co. v. Corbin, 83 Mo. App. 438, 440.] This right exists not only against his partner, but against all persons claiming through him and therefore against his trustee in bankruptcy. [Lindley, Partnership, p. 389.]

Where, however, the partners have the *possession and control* of their own property, they have the right to make any honest disposition of it they see fit. Each may waive his equitable lien, and one of them may apply the property of the firm, with the consent of the others, to the payment of his individual debts. [George Partnership, p. 277; Rock Island Imp. Co. v. Corbin, *supra*; Sexton v. Anderson, 95 Mo. 373, 8 S. W. 564.] And our attention has been called to the following at page 391 of Lindley on Partnership: "Further, a partner's lien on partnership property is lost by the conversion of such property into the separate property of another partner. Therefore, if on a dissolution it is agreed between the partners that the property of the firm shall be divided in specie among them, and that the debts shall be paid in some specified manner; and *if the property is accordingly divided*, but the debts remain unpaid, the lien which each partner had on the property before its division is gone." "Upon the same principle, if two partners consign goods for sale, and direct the consignee to carry the proceeds of the sale equally to their separate accounts without any reserve, *and this is done*, neither partner has any lien on the share of the other in those proceeds." (The italics are our own.)

Respondents claim that the decree of dissolution in this case, providing, as it does, that the receiver shall "distribute the proceeds of such sale (of partnership property), after deducting the costs of this proceeding, equally between the parties plaintiff and defendant", works a conversion of the partnership property into the separate properties of each partner, and that therefore

and thereby plaintiff lost his right to have the partnership assets applied to the payment of partnership debts.

With this claim in mind, we have carefully read the text books and cases and we fail to find that a mere unexecuted agreement for conversion destroys the right of the partner and the derivative right of the partnership creditors, or that such a result can be accomplished at all by the partners after the partnership assets have come into the control of a court of equity. On the contrary, in the cases we have examined the conversion was complete before any question was raised about it and was accomplished while the partners were in possession and control of their own property and before it had come into their custody of a court. In fact, it is said that in order "that an agreement may have the effect of converting joint into separate estate, the agreement must be executed and not executory merely"; that, in such event, "the character of the property will not, in fact, have been changed at the time of the bankruptcy, and it must therefore, be distributed as if the agreement had not been entered into." [Lindley, Partnership, pp. 768, 769.] Again, "even if it has been agreed between partners that on a dissolution the continuing partner shall be entitled to the assets of the firm, still so long as these assets continue subject to the right of the other partners to have them applied in discharge of the joint debts, the assets will continue joint for the purpose of distribution in the event of bankruptcy. To convert them into separate estate the agreement between the partners must be inconsistent with the continuance of this lien." "The mere fact that a partnership has been dissolved, or that a partner has retired, will not be sufficient evidence of an agreement for the conversion of the joint estate of the firm into the separate estate of the continuing partner." [Lindley on Partnership, p. 770.]

And where the partnership assets are being administered by a court, the rule of equitable distribution is

applicable to its fullest extent. [George, Partnership, p. 277.] No principle of law is better settled than that, in the administration of a partnership estate, the assets of the firm must be applied to the satisfaction of the firm creditors to the exclusion of the individual creditors of the individual partners. [Hundley v. Farris, 103 Mo. 78, 15 S. W. 312; Bank v. Brenneisen, 97 Mo. 145, 10 S. W. 884; Goddard-Peck Gro. Co. v. McCune, 122 Mo. 426, 431, 25 S. W. 904.]

"The doctrine that firm assets must be first applied to the payment of the firms debts is a principle of administration adopted by the courts when, from any cause, they are called upon to wind up the firm business, and find that the members have made no disposition or charge upon its assets." [Goddard-Peck Gro. Co. v. McCune, 122 Mo. 426, 432, 25 S. W. 904.]

Now in the case at bar there is no pretense that the property was disposed of or charged prior to the institution of the dissolution proceedings. As we have stated, respondents rely upon the language of the decree for the destruction of Hemm's lien. We doubt very much whether such a result could be accomplished by the decree as against creditors not parties thereto; but this we are not called upon to decide. But we are satisfied that the decree will not have such an unjust result unless the intent is clearly apparent upon its face. Here the decree discloses no such intent. It provides that the property shall be divided between the partners, but there is no intent disclosed to relieve the property from the lien. There is nothing inconsistent with the idea that if partnership creditors presented claims before the funds were distributed, they should be paid. It would indeed be singular for the decree to present any other idea, to be drawn with intent to defeat partnership creditors. All of the circumstances surrounding this decree repel such an inference. The prayer of plaintiff's petition for dissolution mentions the pay-

ment of partnership debts as a condition precedent to division of assets between the partners; the stipulation for the decree did not mention division between the partners, and the receiver paid all of the ordinary partnership creditors to the extent of over eleven hundred dollars with the apparent acquiescence of the court and the parties. Apparently it did not occur to any of them that the decree made improper the receiver's conduct in paying the honest debts of the partnership. Then, too, the conversion was incomplete in that the fund remained undivided; a common fund in the custody and under the control of the court, and subject to its proper orders. Its character as joint property remained in fact unchanged. We consider it unimportant that the receiver in his report stated the respective shares of the partners in the fund. That did not change the fact that he held the entire fund as a whole.

Our conclusion is that there is nothing in the decree or otherwise to justify the inference that the plaintiff has waived or lost his equitable right to have the partnership assets applied to the payment of partnership liabilities. As the trial court proceeded upon a different theory, and it is just and equitable that the fund be retained as long as there is any probability that the Riefling claim may be upheld as a partnership liability, the judgment sustaining the intervening petition of Juede's trustee in bankruptcy will be reversed, and the cause remanded with direction to the circuit court to stay further proceedings upon said petition and to withhold distribution of the fund in the hands of its receiver, until the damage suit of Riefling, being diligently prosecuted, is finally disposed of. It is so ordered. *Reynolds, P. J., and Norton, J., concur.*

**STATE OF MISSOURI ex rel. GEO. B. RIEFLING,
v. HON. MOSES N. SALE, Judge, Respondent.**

St. Louis Court of Appeals, December 30, 1910.

- 1. JURISDICTION: Effect of Appeal: Appellate Practice.** An appeal divests the trial court of jurisdiction of the cause and places it in the appellate court.
- 2. APPELLATE PRACTICE: Construction of Opinions.** The conclusion arrived at by a court in a decision, and not the reasoning by which the conclusion was reached, nor the mere language of the decision, constitutes the guide by which the extent of the rule announced is determined.
- 3. JURISDICTION: Effect of Appeal: Appellate Practice.** Whatever a judgment appealed from covers, the appeal embraces, and the jurisdiction of the trial court over all matters so covered and embraced is suspended pending the appeal; but matters in the cause independent of and distinct from the questions involved in the appeal are not taken from the jurisdiction of the trial court by the appeal.
- 4. PLEADING: Prayer for Relief Beyond Court's Jurisdiction: Effect.** The fact that a petition, in conjunction with a prayer for proper relief, includes a prayer for action which the court is without jurisdiction to take, does not deprive the court of jurisdiction to entertain the petition and grant such proper relief.
- 5. MANDAMUS: Adequate Remedy at Law: Action to Require Receiver to Pay Fund: Bankruptcy Proceedings Inadequate.** To supersede the remedy by mandamus on the ground relator has an adequate remedy at law, such other remedy must be equally as convenient and effective as the proceeding by mandamus; and this is not the case where one seeks by mandamus to have a court compelled to entertain a petition to order a receiver appointed by it to pay a judgment out of the trust fund in his hands, one-half of which fund the court had previously ordered turned over to the trustee in bankruptcy of one of the two ultimate owners of it, from which order the other owner had appealed, since proceedings by the relator in the bankruptcy court would be inadequate, because only part of the fund which relator claims could be found there, while the whole fund could be reached in the hands of the receiver.
- 6. ———: Pendency of Other Action.** The other action or proceeding involving the same question, pendency of which will

prevent issue of a writ of mandamus, must be one to which relator in mandamus is a party, or by which he may be bound.

7. ———: **Scope of Remedy.** In a proceeding by mandamus to compel a court to permit an intervening petition to be filed, matters relating to questions whether the petition should be sustained are for the lower court in the first instance and do not concern the appellate court upon the application for mandamus, where it is limited to commanding the lower court to move.
8. **JURISDICTION: Effect of Appeal: Right to File Intervening Petition, Pending Appeal: Mandamus.** Pending an action of Riefling against two partners for damages, one partner brought suit against the other for dissolution of the partnership, in which suit a receiver was appointed. Thereafter, one of the partners was adjudged a bankrupt and his trustee filed a petition in the dissolution suit for an order on the receiver to pay to him his bankrupt's half of the partnership assets, which, over the opposition of the other partner, was granted, and the other partner appealed. Thereafter, Riefling, having obtained judgment in his action, filed an intervening petition in the dissolution suit, praying for an order on the receiver requiring him to pay said judgment out of the assets in his hands. *Held*, that while the trial court was without jurisdiction to set aside the order appealed from, it had jurisdiction to entertain Riefling's petition, and that mandamus would lie to compel it to entertain the same, the appeal involving only the right of the trustee, as against the other partner, to have the bankrupt's share of the partnership assets, while Riefling's right if existing at all, was against all of them.

Original Proceeding by Mandamus.

PEREMPTORY WRIT AWARDED.

Taylor R. Young and Daniel Dillon for relator.

(1) On a motion for peremptory writ in a case like this, the facts alleged in the petition for the writ and the facts alleged in the return and not denied are considered admitted. *State ex rel. v. Brown*, 205 Mo. 620. (2) When a partnership becomes insolvent or goes into bankruptcy, those having claims against the partnership have a priority as against the assets of the partnership over those having claims against the individual members of the partnership. *Parsons on Part-*

nership (4 Ed.), sec. 382; Shumaker on Partnership, pp. 354-358; Sundley v. Faris, 103 Mo. 79; Phelps v. McNeely, 66 Mo. 558. (3) Property in the hands of a receiver is in the custody and control of the court for the benefit of whoever may eventually establish a right to it; the court itself, through its receiver, has control of the property. The receiver is no party to the litigation, but is only the officer of the court, and his possession is the possession of the court. State ex rel. v. Reynolds, 209 Mo. 173; High on Receivers, sec. 4, chap. 1, and secs. 176, 177 and 78, chap. 7; 34 Cyc., pp. 185, 187, 242 and 243; Harding v. Nettleton, 86 Mo. 662

Buder & Buder and Byron F. Babbitt for respondent.

(1) The pendency of another action or proceeding involving the same question will prevent the issue of a writ of mandamus. 26 Cyc., pp. 184-185. (2) We further submit that respondent was without jurisdiction to hear and pass upon said intervening petition, for the reason that the term at which the appeal in the case of Hemm v. Juede was taken had lapsed long prior to the filing of relator's intervening petition therein. State ex rel. v. Gates, 143 Mo. 63; Crawford v. Railroad, 171 Mo. 79. (3) Intervention ought not to be granted after the rendition of final decree, and after final decree mandamus ought not to issue therefor. 16 Cyc., p. 202; U. S. v. Northern Securities Co., 128 Fed. Rep. 808; Ex parte Branch, 53 Ala. 140; Carey v. Brown, 58 Cal. 180; Ward v. Clark, 6 Wis. 509; Morton v. Supreme Council, 100 Mo. App. 76. (4) This relator has an adequate remedy at law in that his claim is provable in bankruptcy and in the bankruptcy court. Thompson, Admr. v. Williams, 23 Am. Bank Rep. 886. (5) A demand created by the fraud of defendant whereby he procures money from the plaintiff, is not a debt, neither is plaintiff a creditor. Sunday v. Galvin, 55 Mo. App. 412;

Ryles-Wilson Co. v. Shelley Mfg. Co., 93 Mo. App. 178; Steele v. Brazier, 123 S. W. Rep. 480; Estate Co. v. Arms Co., 110 Mo. App. 406-412; Grafton v. Ferry Co., 19 N. Y. Supp. 968; Whitcomb v. Davenport, 63 Vermont 656; Bolden v. Jenson, 69 Fed Rep. 745; Powell v. Railroad, 36 Fed. Rep. 726; Child v. Boston, 137 Mass. 516.

STATEMENT—This is an original proceeding by mandamus begun in this court, the purpose of which is to compel the respondent, the Honorable Moses N. Sale, judge of Division No. 5 of the circuit court of the city of St. Louis, to take cognizance of, consider, determine and decide on its merits, a certain intervening petition, filed by relator, George B. Riefeling, in the suit of Francis Hemm v. Richard F. Juede.

From August 31, 1907 to July 20, 1908, Francis Hemm and Richard F. Juede were in partnership, carrying on a retail drug business in the city of St. Louis. On July 15, 1908, relator commenced suit against Juede in the circuit court of said city to recover damages for personal injuries sustained through the negligence of Juede, acting as a member of said firm, in compounding and filling a physician's prescription. Subsequently, on July 20, 1908, Hemm brought suit in said circuit court against Juede to dissolve the partnership, and such proceedings were had therein that on August 3, 1908, the partnership was dissolved and a receiver was appointed and ordered to take charge and dispose of the assets of the partnership and distribute the proceeds, after deducting the costs, equally between the partners. On September 26, 1908, the receiver filed a report, showing that he had paid the debts of the partnership aggregating \$1178.25, and that with the receivership expenses deducted, he still had in his hands \$6452.38. On September 30, 1908, relator filed an amended petition in the damage suit, making Richard F. Juede and Francis Hemm, doing business under the style and firm name of

Hemm & Juede, parties defendant, and thereafter on the same day relator filed a motion in the suit of Hemm v. Juede praying leave to join the receiver as a party defendant in the damage suit. On February 1, 1909, the suit of Hemm v. Juede was transferred from Division No. 7, Judge Kinsey presiding, to Division No. 5, Judge Sale presiding, where the damage suit was pending. On January 16, 1909, Juede filed a voluntary petition in bankruptcy in the District Court of the United States, and was adjudged a bankrupt. On February 2, 1909, Hemm filed in his suit against Juede a motion praying for an order directing and instructing the receiver to retain all money in his possession as receiver of the assets of the firm of Hemm & Juede until further order of the court, and praying that the receivership should continue until such time as the damage suit should be determined. On February 11, 1909, the trustee in bankruptcy of Juede filed a petition in the suit of Hemm v. Juede praying an order on the receiver to turn over to him \$3295.28, being Juede's half of the partnership assets. On July 6, 1909, in the suit of Hemm v. Juede the motion of Hemm to continue the receivership, etc., and the petition of relator for leave to join the receiver as party defendant in the damage suit were overruled, and the petition of the trustee in bankruptcy for an order on the receiver to turn over to him Juede's half of the partnership assets was granted, and it was ordered therein that after the filing of proper vouchers the receiver should stand discharged. The court made no order at that time respecting the interest of Francis Hemm in the partnership assets and has made no such order since. After an unsuccessful motion for a new trial, Hemm, in the case of Hemm v. Juede, on July 19, 1909, duly took, and was duly allowed, an appeal to the St. Louis Court of Appeals, from the action of the court in granting, on July 9, 1909, the petition of the trustee in bankruptcy for an order to turn over Juede's half of the partnership assets, and

said appeal is now pending in this court. On February 17, 1910, relator obtained judgment in the damage suit against Francis Hemm and Richard F. Juede, as partners, for \$5500 and costs, from which judgment Juede has duly prosecuted his appeal to the St. Louis Court of Appeals, and it is now pending there, but Juede has given no appeal bond. On April 26, 1910, after the term at which the petition of the trustee in bankruptcy was granted and Hemm's appeal therefrom had been allowed, relator filed an intervening petition in the suit of Hemm v. Juede, stating facts substantially as above set forth and alleging that relator had had execution issued on his judgment but could find no property of Hemm or Juede on which to levy, and that the only property which either of them had, was the partnership assets, in the hands of the receiver, and that unless the court would order the receiver to pay the judgment out of said assets, relator will be unable to collect his judgment. That all the debts of the firm of Hemm and Juede, except relator's, had been paid. The said intervening petition concluded with a prayer that the court set aside the order made July 8, 1909, directing the receiver to turn over half of the partnership assets to the trustee in bankruptcy, and to make an order directing the receiver to pay to relator the amount of his judgment out of the partnership assets in his hands. Upon said petition coming up for hearing the respondent judge stated that as, on July 19, 1909, an appeal had been allowed Hemm in the cause to this court, and the cause was then pending here, his court had no jurisdiction to pass on the petition until the cause shall have been remanded. He declined, therefore, to consider said intervening petition until such time as the circuit court again acquired jurisdiction.

Then followed the present application for a mandamus as first above noted. An alternative writ was issued by this court to which return was duly made at

the appointed time, setting forth facts substantially as aforesaid, whereupon relator moved for a peremptory writ.

CAULFIELD, J. (after stating the facts).—The circuit court having refused to entertain relator's intervening petition on the ground of an alleged want of jurisdiction, it is the duty of this court to determine whether the circuit court has such jurisdiction.

It is undoubtedly the rule that an appeal divests the jurisdiction of the trial court and places it in the appellate court. [Brill v. Meek, 20 Mo. 358; Ladd v. Couzins, 35 Mo. 513; Oberkoetter v. Luebbering, 4 Mo. App. 481; Burgess v. O'Donoghue, 90 Mo. 299, 2 S. W. 303; State ex rel. v. Gates, 143 Mo. 63, 69, 44 S. W. 739; Burdett v. Dale, 95 Mo. App. 511, 514, 69 S. W. 480; Story and Clarke Piano Co. v. Gibbons, 96 Mo. App. 218, 221, 70 S. W. 168; Donnell v. Wright, 199 Mo. 304, 313, 97 S. W. 928.] And in stating the rule our courts have used the broadest language. Thus it was said at an early day, "when an appeal has once been granted, the power over the subject is *functus officio* and cannot be exercised a second time." [Brill v. Meek, 20 Mo. 358.] "When an appeal is perfected, the cause is pending in the appellate court, and not in the trial court" and unless the order allowing the appeal is vacated during the term, the trial court "can make no other or further order." [Oberkoetter v. Luebbering, 4 Mo. App. 481.] In State ex rel. v. Gates, 143 Mo. 63, 69, 44 S. W. 739, our Supreme Court said that the effect of the order allowing the appeal "is to transfer the jurisdiction of the case from the circuit court to the appellate court." . . . "In other words, the effect of the order granting the appeal is to suspend all further exercise of judicial functions in the case by the court from which the appeal is taken and to transfer the same to the appellate court, where further judicial proceeding is continued until the case is disposed of. The bond does not

operate at all upon the judicial functions of the court; they are suspended by the appeal, bond or no bond."

But the mere language of a decision is not to be looked to, to discover the extent of the rule announced; it is the conclusion only and not the reasoning by which it was reached, which is the decision of the court, and constitutes our guide. [Koerner v. St. Louis Car Co., 209 Mo. 141, 156, 107 S. W. 481.] The decisions of our courts have not been consistent with the literal meaning of the broad language employed as aforesaid. It has been held that the appeal does not affect the power of the trial court over its own records, or its right to amend, correct and complete them; or its power during the term to set aside the order allowing the appeal; or to set aside the judgment appealed from; or to sign and allow a bill of exceptions; or to revive the cause in the name of an administrator, or, there being no supersedeas, to execute the judgment appealed from. In Crawford v. C. R. I. & P. Ry. Co., 171 Mo. 68, 66 S. W. 350, our Supreme Court said that the statement, "after appeal is taken, the cause is pending in the appellate court so as to deprive the circuit court of further jurisdiction over the cause," applies only to the effect of the appeal after the close of the term of the trial court at which the appeal was taken. And in State ex rel. v. Reynolds, 209 Mo. 161, 107 S. W. 487, the Supreme Court held that the granting of an appeal from a refusal to set aside an order removing one receiver and appointing another and the approval of the appeal bond, did not remove the receiver last appointed and did not warrant the court in ordering the receiver to turn the assets back to the defendant from whose custody they were originally taken. And the court quoted with approval High on Receivers, to the effect that a court may remove or discharge a receiver at any stage of the litigation.

There can be no reason for the rule under consideration other than that confusion might arise if the

trial court and the appellate court were dealing with the same subject at the same time. Thus, our Supreme Court said, in holding that the trial court could not proceed to try the case while an appeal was pending from its action in granting a new trial. "The trial of the case going on in the lower court and the question of the right of such court to try the case, pending in the appellate court undetermined, at the same time, would be a strange condition for any case to fall into." *State ex rel. v. Gates*, *supra*. We have examined the cases declaring the rule under consideration with a view to ascertaining the nature of the judgment or order appealed from, and we discover that in each case it disposed of the entire case or was of such a nature that action by the appellate court might be interfered with by further proceedings, or the proceeding attempted to be had, by the trial court, pending appeal; the inhibited exercise of jurisdiction in some manner involved the order or judgment appealed from. Our attention has not been called to any case that applies the rule to a state of facts even remotely resembling that presented by the case at bar. It would seem to be the true rule that whatever the judgment below legitimately covers, the appeal embraces, and the jurisdiction of the lower court over all matters so covered and embraced is suspended pending the appeal; and that matters independent of and distinct from the questions involved in the appeal are not taken from the jurisdiction of the trial court. [Elliott, Appellate Procedure, sec. 545.]

The necessity for such distinction becomes apparent in extensive receivership proceedings, where, owing to the vastness of the business, the receiver may have taken hold of many pieces or lots of personal property having, respectively, many owners. It is customary for such owners to claim their property by intervening petition filed in the receivership proceedings. These claims may be very numerous, and for property the value of which is insignificant when compared to the magnitude

of the property and interests involved in the receivership proceeding. It would seem absurd to hold that every time an appeal is taken from an order sustaining or rejecting one of these numerous and comparatively insignificant claims, the jurisdiction of the court over the entire receivership proceeding, its power to make orders and to pass upon all other claims, would be suspended. Yet to hold that every appeal in a cause suspends the trial court's jurisdiction must lead to that result. We do not believe that the decisions of our Supreme Court go that far.

The intervening petition which respondent refused to entertain had no connection with the matter on appeal. It involved a different right which could not be affected by the action of the appellate court upon said appeal. The appeal involved the right of the trustee in bankruptcy to have Juede's share of the partnership assets as against Francis Hemm. Relator was not concerned with that, except in an abstract sense. His right, if it existed at all, was against all of them. The determination of their rights between themselves could not affect his alleged superior claim against all of them. It is true that his petition prayed that the order appealed from should be set aside, and the jurisdiction of the trial court as to that order was suspended by the appeal therefrom, but the proper remedy, if there was any, was represented by the prayer that the receiver be directed to pay relator's judgment out of the assets in his hands and the jurisdiction to grant that prayer was unaffected by the appeal. Because relator included in his petition, along with proper relief prayed for, a prayer for action which the court was without jurisdiction to take, did not deprive the court of jurisdiction to grant such proper relief. The prayer for unauthorized action may be ignored.

We do not agree with counsel for respondent that the relator has an adequate remedy at law in that his

claim is provable in bankruptcy and in the bankruptcy court. To supersede relator's remedy by mandamus the other remedy must be equally convenient and effective as the proceeding by mandate. The proceeding in the bankruptcy court would be totally inadequate in that sense because there only part of the fund which relator claims can be found, while the whole fund is in the hands of the receiver.

Respondent further asserts that "the pending of another action or proceeding involving the same question will prevent the issue of a writ of mandamus." This is true; but such other action or proceeding must be one to which relator is a party, or by which he may be bound; and relator is not a party to and will not be bound by the pending appeal from the order sustaining the trustee's petition, which respondent points out as the "other action or proceeding."

Respondent further contends as grounds for denying the writ, that relator's intervening petition came too late, and that relator was not a creditor at the time of the firm's dissolution or when Juede was adjudicated a bankrupt. But these are matters relating to the question whether the intervening petition should be sustained, and are for the circuit court in the first instance. They do not concern us upon this application, where we are limited to commanding the lower court to move. Matters relating to the correctness of its action when it does move may be considered by us on appeal.

Being of the opinion the trial court had jurisdiction to take cognizance of, consider, determine and decide on its merits the intervening petition of relator notwithstanding the pendency of the appeal from its action upon the petition of the trustee, a peremptory writ will be awarded. *Reynolds, P. J., and Nortoni, J., concur.*

**JAMES M. ROLLINS, Respondent, v. CHRIS
SCHAWACKER, Appellant.**

St. Louis Court of Appeals, December 30, 1910.

1. **CONTRACTS: Consideration: Prior Legal Obligation.** Although a promisor was under a prior legal obligation to perform the thing he agreed to perform in a later contract, if the later contract was more detrimental to him than the prior one, or put him under a broader obligation, the later contract is supported by a sufficient consideration.
2. **ATTORNEY AND CLIENT: Contract for Services: Sufficiency of Consideration: Facts Stated.** An attorney engaged to defend a person under indictment, who had fled while out on bail, was also engaged by the bondsman to produce the fugitive in court and to prevent enforcement of liability on the bail bond. The attorney prevailed on the fugitive to return, produced him in court, and had the forfeiture of the bond set aside. *Held*, that whether or not the attorney was acting under his previous employment in prevailing upon the fugitive to return and in producing him in court, the procuring of the forfeiture of the bond to be set aside was not within the scope of his previous employment and was a sufficient consideration to support the contract, entitling him to recover the stipulated compensation.
3. **EVIDENCE: Secondary Evidence: Notice to Produce Document Need Not be Renewed: Trial Practice.** Where plaintiff gave defendant, at a term previous to that at which the case was tried, notice to produce a receipt given by plaintiff to defendant at the day set for trial at such term, or at such time as the cause might be tried, the cause having been continued from term to term, the notice was sufficient to entitle plaintiff to give secondary evidence of its contents, on failure to produce, without a renewal of the notice.
4. **——: ——: Destruction of Original.** Where an original document is shown to have been destroyed while in the hands of defendant, secondary evidence of its contents may be given by plaintiff without giving defendant notice to produce the original.
5. **TRIAL PRACTICE: Remarks of Court: Harmless Error: Appellate Practice.** A remark by the court, in overruling an objection, that the objection was technical, was, at most, harmless error.

Rollins v. Schawacker.

6. **DEPOSITION: Admissibility in Evidence: Absence of Depo-
nent: Evidence.** Where it is shown that a witness is a traveler,
very slight evidence is sufficient to establish his absence from
the jurisdiction, and testimony of a witness that he inquired
at the residence of the deposing witness and was informed
he was in another city was sufficient, in the absence of any
countervailing testimony, to admit the deposition, and evidence
of the occupation of the deposing witness and that he was at
a place where his occupation would require him to be was
sufficient to justify the trial court in assuming, for the purpose
of admitting his deposition, that he was absent in the course
of his business and not by the consent, connivance or collusion
of the party offering his deposition.
7. **INSTRUCTIONS: Singling Out Evidence: Attorney and Client:
Action for Services.** In an action by an attorney against a client
for alleged services, an instruction directing the jury to find for
plaintiff if they believed from the evidence that he had been
consulted by defendant and requested by him to do certain
things and that plaintiff had rendered the services referred to
in his testimony, was not erroneous, as the reference to plain-
tiff's testimony was merely a method of identifying that ele-
ment of his evidence and had no tendency to attach undue im-
portance thereto nor to disparage the testimony of defendant's
witnesses.

Appeal from St. Louis City Circuit Court.—*Hon. Eu-
gene McQuillin*, Judge.

AFFIRMED.

Willis H. Clark for appellant.

(1) The trial court erred in refusing to give to the jury the instructions requested by defendant in the nature of demurrers to the evidence. *Lingenfelder v. Brewery Co.*, 103 Mo. 578; *Storck v. Mesker*, 55 Mo. App. 26; *Tucker v. Barth*, 85 Mo. 114; *Orr v. Sandford*, 74 Mo. App. 187; *Peck v. Harris*, 57 Mo. App. 467; *Railroad v. Morley*, 45 Mo. App. 304; *Swaggard v. Hancock*, 25 Mo. App. 596; *Ashby v. Dillon*, 19 Mo. 619.

(2) The court erred in admitting testimony as to the contents of the alleged receipt claimed by plaintiff to have been given by him to defendant at the office of

plaintiff. *Coffman v. Fire Ins. Co.*, 57 Mo. App. 647; *Sheehan v. Southern Ins. Co.*, 53 Mo. App. 351; *State v. Barnett*, 100 Mo. App. 592; *State v. Lentz*, 184 Mo. 223; *Matthews v. Railroad*, 66 Mo. App. 663; *Chemical Co. v. Nichells*, 66 Mo. App. 678; *Bank v. Louergan's Admx.*, 21 Mo. 46. (3) The remark of the court, in the presence of the jury, characterizing an objection made by counsel for defendant as "technical," was prejudicial error. *State v. Turner*, 125 Mo. App. 21; *Rose v. Kansas City*, 125 Mo. App. 231; *Levels v. Railroad*, 196 Mo. 606; *State ex rel. v. Rubber Co.*, 149 Mo. 181; *In re Imboden's Estate*, 128 Mo. App. 555. (4) The trial court erred in admitting the deposition of the witness Stewart without proper foundation for its admission in evidence. *O'Keefe v. Railroad*, 124 Mo. App. 613; *Carpenter v. Lippitt*, 77 Mo. 242; *Hollfield v. Black*, 20 Mo. App. 328. (5) The instruction numbered 1 given by the court, at the instance of plaintiff, was erroneous and misleading to the jury. *Forrester v. Moore*, 77 Mo. 651; *Hughes v. Rader*, 183 Mo. 630; *Shanahan v. St. Louis Transit Co.*, 109 Mo. App. 228; *Swink v. Anthony*, 96 Mo. App. 420. (6) The verdict was clearly for the wrong party and contrary to the law and the evidence. *Pickens v. Railroad*, 125 Mo. App. 669.

Schnurmacher & Rassieur, for respondent, filed argument.

CAULFIELD, J.—Plaintiff sued defendant in a justice court of the city of St. Louis, to recover \$150, the balance unpaid of \$250, which he claimed was the reasonable value of legal services rendered to defendant at the latter's special instance and request. The defendant filed a counterclaim for \$100 alleged to have been deposited by him with the plaintiff for a certain purpose and not used for that purpose. Upon a trial in the circuit court the plaintiff had judgment for the

amount sued for with interest, and against defendant upon the counterclaim.

After unsuccessfully moving for new trial and in arrest, defendant has duly prosecuted his appeal to this court. The evidence on behalf of the plaintiff tended to prove that the defendant was surety upon the bail bond in the sum of \$800 of one Kronzberg, charged with assault with intent to kill; that Kronzberg had fled to Europe; that the bond had been forfeited and an execution might be issued at any time. That he employed the plaintiff to do what he could to get Kronzberg back and have the forfeiture set aside so that plaintiff would not have to pay the \$800 and costs, and agreed to pay plaintiff \$250 for his services in that behalf. That defendant paid plaintiff \$100 and plaintiff gave him a receipt which stated the terms of the employment and of which plaintiff kept no copy. Plaintiff was his own sole witness as to what service he rendered. He testified that in pursuance of his employment he had several consultations with defendant, attended court several times, twice had the court stay execution to give him a chance to get Kronzberg back; got the address of Kronzberg and wrote to him in Liverpool, England; that Kronzberg came back and plaintiff produced him in court and moved the court to set aside the bond forfeiture, which the court did. It developed in the examination of plaintiff as a witness that at the time defendant employed him he had already been employed by Kronzberg's brother and was to be paid by him to defend Kronzberg against the charge on account of which the bond was given, but he stated that at the time he was employed by plaintiff he told plaintiff of his existing employment to defend Kronzberg. Defendant introduced evidence tending to contradict that offered by plaintiff and tending to prove that the \$100 was deposited with plaintiff to cover only the expense of bringing Kronzberg back and was not used for that purpose.

I. Defendant first assigns as error the action of the court in refusing to give an instruction in the nature of demurrer to the evidence. His theory is, that plaintiff had already been employed to defend Kronzberg and he could not do so "unless Kronzberg appeared in court to be defended;" that "it was a part of plaintiff's employment and duty as attorney for Kronzberg to see that Kronzberg appeared in court and submitted himself to its jurisdiction. Hence any contract on the part of plaintiff, made after he had been so employed and paid to defend Kronzberg, to do anything which his existing contract and employment with the Kronzberg people contemplated and required, was without consideration on his part and plaintiff cannot enforce it."

It is not necessary for us to pass on the question of whether a promise to do what the promisor is already under a legal obligation to do by virtue of a prior contract between him and a third party is a valuable consideration for an undertaking by the promisee to compensate him for doing the thing agreed. However that question may be decided, we feel justified in holding that if the agreement in suit was more detrimental to plaintiff than the agreement with Kronzberg's brother was, or put him under a broader obligation, there was a consideration for defendant's undertaking to compensate him. [Pollock, Contracts, (7 Ed.), p. 185; Hoffman v. Cold Storage Co., 120 Mo. App. 661, 667, 97 S. W. 619.] In addition to securing the return of the fugitive Kronzberg and his appearance in court, the plaintiff was to render service as attorney for the defendant in having the bond forfeiture set aside and defendant relieved from liability. This additional service was not in any wise within the scope of plaintiff's employment to defend Kronzberg in the criminal prosecution. The demurrer to the evidence was properly overruled.

II. Defendant next assigns as error the action of the court in permitting the plaintiff to introduce parol evidence of the contents of the receipt given by him to the defendant. The record discloses that the cause had been originally set down for trial on May 22, 1907, and plaintiff had given defendant notice to produce the receipt on that day or at such time as the case might be tried. The cause was continued from term to term until February 8, 1909, on which day it was tried. Defendant contends that the notice should have been renewed for the time when the trial was actually had. The cases, such as have been called to our attention, seem to hold contrary to defendant's contention. [Gilmore v. Wale, Anthon's N. P. Reports (N. Y.) 87; Wilson v. Gale, 4 Wend (N. Y.) 623; Jackson v. Shearman, 6 Johns (N. Y.) 18.] But there is another reason for upholding the action of the trial court. The defendant testified that the receipt had been destroyed by fire. A notice then was useless and unnecessary. Secondary evidence was proper without it.

III. In the overruling of the objection to the admission of secondary evidence of the contents of the receipt the following occurred:

"The Court: Your objection is technical; it will be overruled.

"Judge Clark: I think the remark of the court is improper in designating the objection as technical, because the rule of law is a litigant is entitled to make his objections, whether technical or not.

"The Court: I appreciate that, Judge Clark, and gave you my reason for overruling the objection. Sometimes it is satisfactory to the attorney to know the reason.

"Judge Clark: I will except to the ruling and the remarks of the court."

The defendant assigns as error the remark of the court designating his objection as technical. We are unable to see how defendant's cause was damaged by such a remark. It was certainly not reversible error.

IV. Defendant assigns as error the action of the trial court in overruling his objection to the reading in evidence of the deposition of one J. W. Stewart. The deposing witness Stewart stated that he was a Pullman car porter and had been such for eight years. That he had a run from St. Louis into Old Mexico City. The plaintiff in his testimony stated that Stewart was a Pullman car porter and then in California. That he had not seen him in six weeks; that he had written a letter to him and had gone to his house and ascertained that he was in Los Angeles.

Where it is shown that the witness is a traveler, as has been shown here, very slight evidence is sufficient to establish his absence from the jurisdiction. In our judgment the testimony of the plaintiff that he inquired at the residence of the witness and was informed that he was in Los Angeles was sufficient, in the absence of any countervailing evidence. [Renton v. Monnier, 77 Cal. 449.] Also that the evidence of the occupation of this witness when coupled with the evidence of his being at a place which lay in the line of his usual run was sufficient to justify the trial court in assuming for the purpose of admitting his deposition that he was absent in the course of his business and therefore not by the consent, connivance or collusion of the plaintiff.

V. We are also unable to agree with defendant that the court erred in instructing the jury at the instance of plaintiff as follows:

"1. If you find and believe from the evidence that plaintiff is and between the 7th day of April, 1906, and the 1st day of June, 1906, was a licensed attorney at law, and was practicing his profession in this city; that

on or about the 7th day of April, 1906, defendant consulted with plaintiff and requested plaintiff, in his behalf, to take such steps as might be necessary to relieve him from whatever liability he might be under, upon the bail bond of one Harry Kronzberg, in an action entitled *State of Missouri v. Harry Kronzberg*, in Division 10 of this court, and that thereupon and thereafter, and between said 7th day of April, 1906, and the 1st day of June, 1906, plaintiff rendered the services referred to in his testimony, then you will return your verdict in favor of the plaintiff on his cause of action.

"2. If you find in favor of the plaintiff, under the evidence and other instructions in the cause, then you will assess his damages at such an amount as you may find and believe from the evidence was the reasonable value of the services rendered by plaintiff, deducting therefrom whatever amount, if any, you may find and believe from the evidence plaintiff received on account of such services from defendant."

Instruction No. 3 was as to the allowance of interest.

Defendant's point is directed at the first instruction. His counsel argues that the reference to the "services referred to in his (the plaintiff's) testimony," gave to the jury a plain inference that in considering what, if any, services were rendered by the plaintiff "they might have reference solely to the testimony of the plaintiff and might leave out of consideration all the contradicting and impeaching testimony." This position of defendant is untenable. By the instruction the court told the jury that if they found and believed from the evidence (meaning of course all the evidence in the case) that the plaintiff had "rendered the services referred to in his testimony," then, etc. The language in which the instruction was drawn, in so far as it alluded to the "services referred to in his testimony," was merely a method of identifying that element of the plaintiff's evidence. It had no tendency to attach undue im-

Grier v. Strother.

portance to the testimony of plaintiff nor to disparage the testimony of the witnesses produced by defendant.

The judgment is affirmed. *Reynolds, P. J.*, and *Nortoni, J.*, concur.

HARRISON P. GRIER, Respondent, v. JEFFERSON
D. STROTHER, Appellant.

St. Louis Court of Appeals, December 30, 1910.

1. **PARTNERSHIP: Dissolution: Liability of Outgoing Partner.** An outgoing partner, on dissolution of the firm, is not liable for the subsequent obligations of the continuing partner, after due notice has been given of the dissolution and of the partner's retirement.
2. ———: ———: ———: **Conversion of Property of Firm.** A partnership, consisting of three partners, Grier, Strother and Shepard, was dissolved by the withdrawal of Strother. After the dissolution, Strother, the withdrawing partner, took several yoke of oxen belonging to the partnership, and after using them a few days, returned all but one animal to Shepard, who seemed to be the controlling spirit in the partnership. The animal which was not returned had suffered a broken leg and died. In an action for an accounting of partnership matters, brought against Strother by Grier, *held*, that Strother was not chargeable to plaintiff as for a conversion of all the cattle so taken, but was only bound to account to him for his one-third interest in the animal that died.
3. ———: ———: ———: ———. A retiring member converting to his own use certain of the firm's property is liable to account for the interest of his partners therein.
4. ———: **Action for Accounting: Parties.** After the dissolution of a partnership, consisting of plaintiff, defendant and Shepard, the latter was discharged in bankruptcy. Plaintiff sued defendant and Shepard for an accounting, but the suit was dismissed as to the latter, because of his bankruptcy. No point was made by plaintiff or defendant as to the propriety of the accounting being had when only two of the partners were before the court, but instead both parties insisted that their rights should be determined as between themselves. The trustee of Shepard made no claim to any right arising out of the partnership, and

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any possible litigation that might arise concerning the accounts of the firm, not included in the controversy between plaintiff and defendant, was barred by limitation. *Held*, that, though all the partners are, in general, necessary parties to a suit for an accounting, the joinder of Shepard, or his trustee, was not essential, under the circumstances, to a determination of the rights of plaintiff and defendant.

5. ———: ———: **Trusts: Resulting Trusts.** A partnership, composed of Grier, Strother and Shepard, engaged in the business of operating a sawmill, desired to purchase a tract of timber land for one thousand dollars. The firm had no money and Grier was unable to contribute his share of the purchase price, and Strother and Shepard paid for the land and took a deed for themselves. The timber was sold by the partnership, after which the land was sold by Strother and Shepard for sixteen hundred dollars. In an action for an accounting brought by Grier against Strother, *held*, that, while defendant and Shepard were trustees of the title for the firm, the firm was only entitled to share in the profits of the sale, to-wit, six hundred dollars, and hence plaintiff's interest in that transaction was one-third of that sum.
6. ———: ———: **Joint Obligation: Set-Off.** After dissolution of a firm, consisting of plaintiff, defendant, and Shepard, the latter became a bankrupt, and in a suit between plaintiff and defendant for an accounting, his rights were stipulated out of the case. *Held*, that, under such circumstances, plaintiff was not chargeable with two-thirds of the value of firm property converted by him, on the theory that the rights of Shepard inured to defendant, in trust for the account of Shepard, under section 1870, Revised Statutes 1909, providing that in all actions brought against one or more joint obligors or promisors, any debt or demand due from plaintiff to defendant in the action, or to all the obligors or promisors in the contract sued on, may be set off against the demand of plaintiff, but plaintiff was only chargeable with defendant's one-third interest in such property, since to apply the statute to this case, plaintiff would be required to respond for Shepard's interest in the property converted, when he and his rights were stipulated out of the case and the other matters involved in the accounting were considered on that basis.
7. ———: ———: **Set-Off: Indebtedness to Firm Against Individual Liability of Partner.** Plaintiff, defendant and one, Shepard, were engaged in operating a mill as partners. Plaintiff sued defendant for an accounting, the suit being brought in part on the theory that he was responsible as the remaining solvent member of the firm of Shepard and Company, which became indebted to the bill partnership on account of its agency for the latter. Plaintiff was indebted to Shepard and Company in

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an amount greater than the latter's indebtedness to the mill partnership. *Held*, that equity required that defendant should receive credit at least to the extent plaintiff was indebted to Shepard and Company, but that he was not entitled to use the balance of plaintiff's indebtedness to that firm as an offset against defendant's personal liability to plaintiff, as an individual member of the mill company, under the rule that an account due a partnership cannot be offset against the debt of an individual member, and this notwithstanding defendant on selling his interest in both firms to Shepard reserved the individual account of plaintiff.

8. ———: **Dissolution of Partnership: Bankruptcy of Partner: Right of Partnership to Collect Debts.** While, by the bankruptcy of a partner, his share passes to his trustee in equity, the partnership continued *inter se*, to the extent at least of permitting it to collect outstanding debts.
9. **SET-OFF: Partnership: Partnership Debt Against Individual Liability.** An accounting due a partnership can not be set off against the debt of one of the partners.
10. **ESTOPPEL: Partnership: Action for Accounting: Position Taken in Pleadings.** Where, in a suit for an accounting between two of the partners of a firm, plaintiff both in his bill and in his proof insisted that defendant have credit on the account as finally stated for the total amount of plaintiff's indebtedness to another firm, of which defendant was a member, it was error for the court to refuse to give defendant the benefit of such credit, though he was not otherwise entitled thereto.

Appeal from Pemiscot Circuit Court.—*Hon. Henry C. Riley*, Judge.

REVERSED AND REMANDED (*with directions*).

C. G. Shepard and Faris & Oliver for appellant.

(1) Respondent having, by solemn admission in his petition, admitted that appellant was entitled to credit for the item of \$1477.69, is bound by said admission, and is estopped from denying its correctness. *Harrison v. McReynolds*, 183 Mo. 533; *Cousins v. Bowling*, 100 Mo. App. 452; *Cross v. Railroad*, 71 Mo. App. 585. (2) Respondent was seeking to hold appellant responsible for all C. G. Shepard & Co. had received from the

Mill Company, and hence appellant was entitled to credit for the full amount respondent was indebted to C. G. Shepard & Co., sec. 4491, R. S. 1899; *Skirker v. Smith*, 48 Mo. App. 91; *Mortland v. Holton*, 44 Mo. 58; *In re Excelsior Mfg. Co.*, 164 Mo. 316.

W. W. Corbett for respondent.

(1) As partners of Mr. Grier, the other partners do not stand towards him, and occupy the same relation to him that they would to an ordinary individual. They are agents, one for the other, and notwithstanding they may have had a settlement with reference to some of the partnership affairs, and a dissolution, still the partnership continues, until the whole relations of the partnership affairs are adjusted. *Bender v. Markle*, 37 Mo. App. 230; *Filburn v. Ives*, 92 Mo. 388. (2) They must deal fairly with their partner, they must, as his agent, tell him everything concerning the partnership affairs. Nothing short of a complete disclosure of facts known to either partner, of which the other is ignorant, will exonerate the partner knowing them, from the charge of undue and fraudulent concealment. *Story's Eq. Jur.*, secs. 204, 205, 207, 213, 216, 220; *Martin v. Lutkwitte*, 50 Mo. 58. (3) Strother could not sell his interest in the partnership of which Mr. Grier was a member, and vary the business of the partnership, without Mr. Grier's consent. *Tutt v. Cloney*, 62 Mo. 116; *Pomeroy v. Benton*, 57 Mo. 53. (4) The evidence shows that the one hundred and sixty acres of land named in the bill was paid for with the partnership money; even the sixty dollars interest on the note given for the land was paid for by the mill company, and land for partnership purposes is to be treated as personalty. *Thompson v. Holden*, 117 Mo. 118. (5) Shepard and Strother could not use the funds of the partnership for their private enterprises. *Brown v. Shackelford*, 53 Mo. 118; *Pomeroy v. Benton*, 57 Mo. 53.

NORTONI, J.—This is a suit in equity for an accounting. Plaintiff sues the defendant, who, besides being his partner in a mill company, was also formerly a partner in the firm of C. G. Shepard & Company, which acted as agent for the mill company, and seeks an accounting with respect to a number of items set forth in his bill.

The court referred the matter to a member of the bar who heard the evidence, found the major portion of the issues for defendant and recommended a judgment for several hundred dollars in favor of him against plaintiff. On exceptions filed to this report, however, the trial court sustained the same and upon reviewing the matter, decreed an accounting in favor of plaintiff for several hundred dollars and from this judgment defendant prosecutes the appeal.

It appears in May, 1893, plaintiff Grier, defendant Strother, and one, C. G. Shepard, formed a co-partnership for the purpose of conducting a saw mill business in Pemiscot county. Plaintiff Grier was possessed of no means but was experienced in the saw mill business. By the partnership agreement, Shepard and Strother furnished the mill at an expenditure of about \$3000 and plaintiff became associated with them therein as an equal partner by a contribution of his experience and labor. This partnership was known and is called The Mill Company by way of distinguishing it from C. G. Shepard & Company, a co-partnership, which was then engaged in conducting a general merchandise business at the town of Caruthersville, in the same county. At the time The Mill Company was formed through the association of plaintiff Grier and defendants Strother and Shepard, defendants Strother and Shepard were engaged in conducting a general store at Caruthersville as a co-partnership under the firm name of C. G. Shepard & Company. From the institution of the partnership, known as The Mill Company, the mercantile

firm of C. G. Shepard & Company acted as agent, or in all things conducted the business matters of The Mill Company. It appears that C. G. Shepard & Company sold all the lumber manufactured by the mill, collected the moneys therefor, etc. C. G. Shepard & Company also paid the bills of The Mill Company and charged them to that partnership. When anything was needed for The Mill Company, C. G. Shepard & Company would purchase the same and charge it on its books to The Mill Company. The only books which were kept pertaining to the business of The Mill Company were those kept by the C. G. Shepard Mercantile Company at Caruthersville. The co-partnership of C. G. Shepard, J. D. Strother and plaintiff Grier, known as The Mill Company, continued to exist until August 21, 1899, at which time defendant J. D. Strother retired therefrom by selling his one-third interest therein to Charles G. Shepard. The mercantile firm of C. G. Shepard & Company was dissolved the same day through defendant J. D. Strother's retirement therefrom, he having sold to C. G. Shepard his one-half interest in everything pertaining to that business, except the individual account of \$1477.69 of plaintiff Harrison P. Grier, which continued as before by agreement of the parties until The Mill Company's affairs should be finally settled. Though the partnership operating the mill was dissolved, as suggested, on August 21, 1899, the mill itself was not operated after May of that year. It appears at the time the mill suspended operation there was a large amount of lumber in the mill yards which was subsequently disposed of by C. G. Shepard & Company after the dissolution of that firm by the retirement of defendant Strother, for though Strother retired August 21, C. G. Shepard continued in business for several years thereafter under the original firm name of C. G. Shepard & Company. Some two or three years after defendant Strother retired from both of these firms, Charles G. Shepard was declared a bankrupt by an adjudication of the

United States District Court for the Eastern District of Missouri, and The Mill Company's affairs remaining unsettled, plaintiff Grier several years thereafter instituted this suit against defendant Strother who was one of his former partners in the saw mill as well as the former partner of C. G. Shepard, the bankrupt, for an accounting in part as to the agency of C. G. Shepard & Company and in part as to matters pertaining to The Mill Company.

The record is voluminous and the testimony as to some of the items in dispute is most obscure. In view of this, we will not attempt to set forth all of the proof as made and the various theories advanced by the parties, but will review only such portions thereof as are material. Several items of the account relied upon may be disposed of in short order, for the evidence touching the matters involved gives rise to no question of doubt. For instance, numerous items with which it is sought to charge defendant Strother as the solvent partner of C. G. Shepard & Company, in view of the bankruptcy of C. G. Shepard, may not be allowed to plaintiff on any theory for the reason that the obligation of C. G. Shepard & Company, with respect to them accrued after defendant Strother had retired from that partnership and after due notice of that fact had been given to all concerned. It will be remembered that after the retirement of defendant Strother, C. G. Shepard conducted the mercantile business under the firm name as before, but Strother was not responsible for the obligations of Shepard, contracted under that name after notice to plaintiff Grier of the dissolution, which was conceded. On this theory, both the trial court and the referee found plaintiff was not entitled to recover against defendant Strother on several items in the bill. Both the court and referee found plaintiff was not entitled to recover on account of a calculated statement in his bill of amounts due plaintiff for one-third interest in certain credits shown by the books Septem-

ber 27, 1899 because said amounts, \$153.66 in all, were received by C. G. Shepard & Company, of which defendant Strother was formerly a member, after that partnership was dissolved. Both the court and the referee found plaintiff was not entitled to recover on his item \$1575.05 and two-thirds for lumber sold by Shepard during the months of November and December, 1899, and January, 1900, because said lumber was sold by C. G. Shepard after the dissolution of the firm of C. G. Shepard & Company, of which defendant Strother was therefore a member. Both the court and the referee agreed plaintiff was not entitled to recover on account of his item of \$83.33, one-third interest in a saw cab and fixtures, sold to one, Mitchell, because such sale was made by C. G. Shepard after the dissolution of the firm of C. G. Shepard & Company, of which defendant Strother was not then a member. Both the court and the referee found that plaintiff was not entitled to recover on his item of \$41.66 and two-thirds, representing one-third interest in a steam boiler sold to Smyth & Harvey, because such sale was made by C. G. Shepard after the dissolution of the firm of Shepard & Company. In respect of these items, the evidence appears to be conclusive that they were disposed of by Shepard after the dissolution of the firm of C. G. Shepard & Company. Such being the fact, of course the present defendant Strother is not to be charged as the solvent member of the former firm of C. G. Shepard & Company, for he received no benefit whatever from such sales. The finding of the court and the referee as to these items is approved. If anyone is to respond to plaintiff for his one-third interest as to these matters, it should be C. G. Shepard, but by his subsequent bankruptcy, he, of course, is discharged. However, there is no principle of either law or equity on which defendant Strother may be required to respond with respect to benefits received by C. G. Shepard & Company after the retirement of defendant and due notice to plaintiff.

Though the referee found plaintiff was entitled to recover on his item of fifty dollars, representing one-third interest in the steam engine said to have been appropriated by defendant Strother, the court found otherwise on reviewing the matter, for it appeared defendant Strother did not appropriate the engine. He did no more than to use it a few days. It does not appear that he sold it or permanently appropriated it to his own use. The finding of the court as to this matter is approved.

After the partnerships were dissolved, defendant Strother took several yoke of oxen, which were owned by The Mill Company, and used them a few days but returned all but one animal to Shepard, who seemed to be the controlling spirit in the mill partnership. While the cattle were in possession of defendant, one of them suffered a broken leg and died. Plaintiff sues for one-third interest in all, but the evidence is conclusive that Shepard and not this defendant disposed of the cattle some time after the dissolution of the partnerships and, in this view, the referee allowed plaintiff \$33.33 only, representing his one-third interest in the ox which died while in defendant's possession. On reviewing this matter, the trial court allowed plaintiff \$16.66 as his interest in the same ox. We believe the judgment of the trial court should be approved as to this, for it appears that such was about one-third the value of the animal for which defendant should account to plaintiff.

It appears in the fall, after the dissolution of the partnerships and the work at the mill had been shut down, defendant took several head of old mules, which belonged to The Mill Company, and appropriated them to his own use. Both the court and the referee found such to be the fact and charged him with \$183.33 as the amount he should respond to plaintiff for his one-third interest therein. This item should be approved as well, for it is amply supported by the testimony. The same may be said with respect to plaintiff's claim as

to one log wagon and certain chains which defendant appropriated to his own use under like circumstances. The court and referee both found defendant should answer for plaintiff's one-third interest as to these matters in the amount of \$66.66. Defendant also appropriated to his own use three and one-half sets of harness valued at \$52. Both the court and referee found this fact and that plaintiff's one-third interest therein was \$17.83. The testimony amply supports the charge and it appears to be just. Defendant appropriated to his own use one gang-edgar, a pump, etc., after the partnerships were dissolved and the mill was suspended. Both the court and the referee found this fact and that plaintiff's one-third interest therein was \$66.66. On the testimony, the conclusion seems to be just and should be approved. The same may be said with respect to an item of five dollars, which represents plaintiff's one-third interest in a log turner appropriated by defendant. While the mill partnership was a going concern, it appears defendant hauled away from the mill certain lumber and used it in a residence and a gin property. For this the referee charged him \$100 but the court fixed plaintiff's one-third interest therein at \$58.33. We believe the charge of \$100 as made by the referee is sustained by the testimony and therefore allow the item as \$100.

It appears that all of these items, aggregating \$456.14 represent property of The Mill Company, consisting of plaintiff Grier, C. G. Shepard and defendant Strother, which was appropriated to his own use by defendant Strother. In view of this, of course, the obligation of Strother is to account to his two co-partners in that firm for their two-third interest and Shepard, or rather his trustee, who succeeded to his interest by virtue of his subsequent bankruptcy, should have been a party to the suit to the end of concluding the whole matter by one judgment, for the law is averse to permitting a situation to arise where a subsequent litigation

may ensue about the same subject-matter. Shepard was originally a party defendant to the present bill but in view of his bankruptcy, the suit was dismissed as to him and the cause proceeded by consent of all as though he or his trustee in bankruptcy were wholly unconcerned. No point has been made by the parties as to the propriety of the accounting when only two of the partners are before the court, but instead, both insist that their rights shall be determined on the record as made. The bankruptcy of Shepard has long since been settled. It seems his trustee made no claim to any rights in respect of this mill partnership and if he had, no doubt, the amount Shepard owed The Mill Company would offset any claim in favor of the bankruptcy estate and plaintiff has asserted no claim against that estate for anything that Shepard should have contributed to him. The Statute of Limitations has interposed its bar to any possible litigation that may arise in future as to any of the matters pertaining to the accounts of The Mill Company not included in the controversy between the parties to the present record. Shepard himself, who is a member of the bar, is attorney for his former partner, defendant Strother and all insist the court shall determine the rights of the two parties, plaintiff and defendant, alone. In view of these facts, we will consider the case on the theory it was tried and dispose of the matters involved in accord with the equities which lie between the two solvent partners who appear to have mutual, valid and subsisting claims. So considered, plaintiff is entitled to credits against defendant representing his one-third interest in the items above set forth, pertaining to The Mill Company, to the amount of \$456.14.

Next in order, we will consider matters for which defendant should account as a member of the firm of C. G. Shepard & Company, on the theory of the agency of that co-partnership for The Mill Company. Before the firm of C. G. Shepard & Company dissolved, that firm

sold to S. P. Reynolds certain timber for which it is admitted \$1000 was paid, but the referee charged defendant on the basis of \$800 only and allowed plaintiff \$266.66 in respect of that item as representing his one-third interest. On review, the court treated with the item on the basis of \$500 and charged defendant with \$166.66, representing plaintiff's one-third interest therein. It is true the books of Shepard & Company show that they received only \$500 cash from S. P. Reynolds but it is conceded in the testimony of both Shepard and Strother the firm received \$1000 in cash for this timber, and plaintiff should be allowed \$333.33 as his one-third interest therein. The referee allowed plaintiff \$438.46 on account of his one-third interest in the balance due The Mill Company, as shown by the books of C. G. Shepard & Company. On reviewing this matter, the court allowed plaintiff \$472.21 as one-third the balance shown to be due The Mill Company by such books. Upon inspecting the record, it is difficult to ascertain with any degree of precision what plaintiff should have. The books are not before us and only occasional excerpts therefrom are to be found in the record, besides all of the figures do not appear to be accurate. It may be mistakes were had in copying long accounts into the bill of exceptions. We believe, however, that \$472.21, the amount found by the court, approximates the amount due plaintiff on this score and approve the finding of the court to that effect.

The referee denied plaintiff any interest whatever in respect of money received for the sale of 160 acres of land but the court allowed him \$266.66 as one-third interest in \$800, which it treated with as representing the value for which defendant should account pro rata. We believe this was error, for on any theory, if plaintiff recovers at all as to this, he is entitled to \$200. As to this matter, it appears The Mill Company desired to buy the timber standing on 160 acres of land near the saw mill. Upon making inquiry, they discovered the

tract of land consisting of 160 acres, together with the timber thereon, could be purchased for \$1000. Both plaintiff and defendant estimated the timber and agreed that it alone was worth almost, if not quite, \$1000 as it stood. The three partners then met and agreed to buy the land. Plaintiff, who had charge of the saw mill, looked to his associates to consummate the deal. Shepard and Strother purchased the land and paid \$1000 of their own moneys for it and took the title in the name of Shepard and Strother. The Mill Company cut the timber from the land, worked it up into lumber and paid \$60 interest to Shepard and Strother, or C. G. Shepard & Company, on the \$1000 they had invested therein. It is clear enough that the understanding at the time was, the land was to be purchased for the benefit of The Mill Company and the charge of interest against it for the investment is a convincing circumstance to that effect. Afterwards, before the partnership was dissolved, Shepard and Strother sold the land, the timber having been worked up, to one, Talley, for \$1600. Plaintiff insists he is entitled to one-third interest of the amount his partners received for the land, that is \$533.33. It is entirely clear that Shepard and Strother should account to the plaintiff on this matter, for they occupied a relation of trust as to him with respect to whatever benefits accrued to them through the purchase and the sale of the land in the circumstances referred to. But they should not be held to account for one-third the amount they received; for it was their money alone which was invested. In other words, plaintiff Grier contributed no part of the \$1000 applied for the purchase price nor did The Mill Company, of which he was a member, for at the time it was without funds. Shepard and Strother alone advanced the money, \$1000, and purchased the land. The Mill Company paid the interest to them on the money advanced and worked off the timber. Having thereafter sold the land for \$1600, of course, Shepard and Strother are en-

titled to deduct the \$1000 to repay that amount of their individual funds advanced and should be held to account because of the trust relation to plaintiff for his one-third interest in the profit made on account of the sale. The profit made was \$600. Plaintiff's one-third interest therein is \$200. The whole transaction having taken place prior to the dissolution of the partnership of C. G. Shepard & Company, of course, the present defendant is obligated on account of that partnership relation to respond to plaintiff for his full share.

From what has been said, it is manifest defendant should account for his one-third interest in property of The Mill Company, appropriated to his own use in the total sum of \$456.14 and as a member of the firm of C. G. Shepard & Company in the amount of \$1005.54; the total amount aggregating \$1461.68.

We come now to review certain credits to which it clearly appears defendant is entitled. Plaintiff appropriated to his own use certain lumber which belonged to The Mill Company, valued at \$50 and the court allowed defendant a credit of one-third of this amount, that is, \$16.66. Ordinarily plaintiff as a joint obligor within the sense of the statute should respond for two-thirds of the amount of the lumber; for if plaintiff Grier appropriated \$50 worth of lumber from The Mill Company, which consisted of three equal partners, then his interest in that lumber is $\$16.66 \frac{1}{3}$ and the interest of his partners, Shepard and Strother is $\$33.33 \frac{2}{3}$. The statute says, in all actions brought against one or more joint obligors or promisors, any debt or demand due from plaintiff to defendant in the action or to all the obligors or promisors in the contract sued upon may be set off against the demand of the plaintiff. [Sec. 1870, R. S. 1909.] Plaintiff Grier owes his two partners jointly $\$33.33 \frac{2}{3}$ for two-thirds interest in the lumber appropriated in which he owned one-third, and under ordinary circumstances, this amount would be available

to defendant as an offset; for as a member of the mill partnership, the rights of Shepard inured to him in trust for Shepard's account. But the rule is without influence in the peculiar circumstances of this case. To apply it would ignore the most fundamental precepts of natural justice, for by so doing plaintiff would be required to respond for Shepard's interest in the lumber when he and his rights are stipulated out of the case entirely and other accountings are had on that basis. In this view, plaintiff should answer to defendant for such interest in the lumber as defendant alone may have had, that is defendant's one-third interest amounting to \$16.66 1-3.

In his bill, plaintiff admits an individual indebtedness to the firm of C. G. Shepard & Company before and at the time of its dissolution, amounting to \$1477.69. It seems this was an account for goods which plaintiff purchased throughout several years at the store of his partners, C. G. Shepard and J. D. Strother. Besides admitting this indebtedness, \$1477.69, in his bill, plaintiff testified to the fact of such indebtedness on the witness stand and insisted defendant should be credited to that extent. Notwithstanding this, however, and notwithstanding the fact that the referee allowed defendant the benefit of this credit, the court, on reviewing the exceptions to the referee's report, allowed one-half of it only, that is to say, the court allowed defendant a credit of \$738.85. No one can doubt that plaintiff would be estopped by his pleading alone from disputing the credit which he conceded to be \$1477.69. [Harrison v. McReynolds, 183 Mo. 533, 82 S. W. 120; Cousins v. Bowling, 100 Mo. App. 452, 74 S. W. 168.] But having admitted in his testimony that he owed C. G. Shepard & Company the amount mentioned, we are at a loss to ascertain on what theory the court allowed defendant the benefit of only one-half of that amount, for it was certainly all available to him under the pleading alone. Then, too, having sued defendant for an accounting in

part on the theory that he is responsible as the remaining solvent member of the firm of C. G. Shepard & Company which became indebted to The Mill Company on account of its agency in that behalf, of course, equity and good conscience require that defendant shall receive credit at least to the extent plaintiff was indebted to the firm of C. G. Shepard & Company on the obligation of which it is sought to charge defendant Strother. In other words, in so far as plaintiff predicates his right to recover against defendant as a member of the co-partnership of C. G. Shepard & Company on the obligation of that firm, the rights of that co-partnership inure in equity to defendant's benefit. If defendant is to respond for the co-partnership obligation, natural justice alone requires that it shall be only for such an amount as the co-partnership is indebted after first deducting such amount as plaintiff owed the firm on his individual account.

From items heretofore set forth, it appears defendant is to respond on the partnership obligation of C. G. Shepard & Company for the amount of \$1005.54 and this being true, an equal amount, that is, \$1005.54, of plaintiff's individual account with the co-partnership is available as an offset on the most familiar principles of equity alone. But the plaintiff's individual account in amount exceeds that sum by \$472.15 and the important question is: What shall be the disposition of this balance? After plaintiff's account against C. G. Shepard & Company is offset by an allowance of the same amount to defendant, the balance for which plaintiff seeks a recovery stands as an individual indebtedness to him from Strother on account of The Mill Company, concerning which Shepard is to be regarded as out of the case. Such individual liability of Strother is ascertained to be \$456.14.

By the bankruptcy of Shepard, it is undoubted one-half of the \$472.15 balance due C. G. Shepard & Company passed to his trustee but in equity, no doubt that

partnership continued *inter se* to the extent at least for the purpose of collecting debts due and outstanding. In respect of these, Strother would occupy a relation of trust in favor of the trustee who succeeded to the rights of Shepard. But after granting so much, an account due a partnership is not to be set off against the debt of an individual member. [Lamb v. Brolaski, 38 Mo. 51.] So it is, if we look alone to the equities which lie between the parties and the rules of law which obtain, defendant Strother is not entitled to the benefit of the balance of \$472.15 owing by plaintiff to C. G. Shepard & Company after offsetting accounts with that firm. This is true notwithstanding defendant Strother, on selling his interests to Shepard in the two partnerships, reserved the individual account of plaintiff from that transaction, for such account due the partnership is not available to him as an offset against his individual debt to plaintiff.

But, be all of this as it may, under the pleadings, the plaintiff cannot recover the balance found to be due him for the reason he is estopped thereby. Both in his bill and in his proof, plaintiff insists defendant shall have credit on the account as finally stated for the amount of \$1477.69, which he owed C. G. Shepard & Company. A party may waive his rights, if he so desires, to an amount which may otherwise be found to be due him, or he may donate the entire amount to another. However much a court of equity may be inclined to ascertain and declare a true result in accord with the precepts of good conscience, it may not withstand the force and effect of such waiver intentionally done nor evade the consequence of an estoppel deliberately made by averment in the bill. Because plaintiff in his bill insists upon crediting defendant with the full amount of \$1477.69, the court will do likewise.

From an examination of the whole matter, we ascertain the fact to be, and state the account, as follows:

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Plaintiff should receive a credit for the total amount of \$1461.68 against which he should be charged in favor of defendant in a total amount of \$1494.35. After deduction, we find a balance due defendant of \$32.67. The judgment will therefore be reversed and the cause remanded with directions to the trial court to enter a decree in favor of defendant against plaintiff for \$32.67 and costs of suit. It is so ordered. *Reynolds, P. J., and Caulfield, J., concur.*

R. W. DUNEPHANT, Respondent, v. AMANDA V. DICKSON and MISSISSIPPI VALLEY TRUST COMPANY, TRUSTEE, Appellants.

St. Louis Court of Appeals, December 30, 1910.

1. **TRUSTS: Spendthrift Trusts: May Be Created.** A spendthrift trust, limiting the right to alienate, and placing the proceeds of the estate beyond seizure by creditors of the *cestui que trust* during his life, may be created in this state.
2. **———: ———: Heaton v. Dickson, Post, Followed.** Following *Heaton v. Dickson, Post*, it is *held* the will under consideration did not create a spendthrift trust.

Appeal from St. Louis City Circuit Court.—*Hon. George H. Williams, Judge.*

AFFIRMED.

Harry H. Haeussler and Chas. J. Macaulay for appellants.

W. Christy Bryan and O. L. Cravens for respondent.

NORTONI, J.—This is a proceeding in equity in the nature of a creditor's bill or equitable garnishment. The finding and decree were for plaintiff and defendant prosecutes the appeal.

Defendant Amanda V. Dickson is the beneficiary of a trust estate, settled to her use by her father in his will. Defendant Mississippi Valley Trust Company is trustee, in which resides the legal title to the trust estate. John Maguire was the original trustee under the will but upon his death defendant Trust Company succeeded him as such. The trust estate consists of certain real property which affords an income. By direction in his will, the donor stipulated, substantially, that defendant Amanda V. Dickson, who is his daughter, should receive quarterly, from the trustee, one-fifth of the net income from the rental of such real estate for the period of her natural life. Plaintiff obtained a judgment at law on an indebtedness against defendant, Mrs. Dickson, but was unable to collect the same, as she had no property in this state subject to execution or attachment. Mrs. Dickson is insolvent under our law. Except for her equitable estate in income from the trust property above mentioned, she is wholly without means in Missouri. It appears, too, Mrs. Dickson is a non-resident of the state and has been for several years last past. The suit proceeds by a bill in equity seeking to sequester a sufficient amount of Mrs. Dickson's one-fifth interest of the net income from the trust estate to pay plaintiff's judgment and costs.

In the trial court, plaintiff prevailed, and on appeal the only question presented for decision relates to the character of the trust created by the will. If it be a spendthrift trust, then, of course, Mrs. Dickson's equitable interest in the income from the trust estate may not be sequestered in this proceeding, as it is competent in this state for the donor to create such a trust and thereby limit the right of alienation and place the proceeds of the estate beyond seizure by creditors during the life of the *cestui que trust*. [Partridge v. Cavender, 96 Mo. 452, 9 S. W. 785; Lampert v. Haydel, 96 Mo. 439, 9 S. W. 780; Pickens v. Dorris, 20 Mo. App. 1; Lampert v. Haydel, 20 Mo. App. 616.]

It is earnestly argued by defendant that the donor's will, though not setting forth a limitation upon the right of alienation or reserving the income of the trust property from creditors in express terms, clearly imports such to be his intention and that therefore a spendthrift trust is created which renders the income of the estate immune against the attempt to sequester it, for the reason the clear and undoubted intention of the donor is to be effectuated though not expressed in positive terms. [26 Am. and Eng. Ency. Law (2 Ed.), 141, 142.] We have set forth the material portion of the will referred to in the companion case of Heaton v. Dickson and Mississippi Valley Trust Company, the same defendants, decided today and reported in 153 Mo. App. 312, to which reference is made for further information in that behalf. The arguments presented here have been fully considered in that case and the theory of a spendthrift trust rejected. It is clear that there are no express words in the will which restrain Mrs. Dickson, the *cestui que trust*, from alienating or anticipating the income of the estate or in any manner reserve the income, free from the claims of creditors. Neither is there a clear and undoubted intention of the donor to that effect manifested by the instrument.

In accordance with the views expressed in the case cited, the judgment should be affirmed. It is so ordered. *Reynolds, P. J., and Caulfield, J., concur.*

WARREN HEATON, Respondent, v. AMANDA V.
DICKSON and MISSISSIPPI VALLEY TRUST
COMPANY, Appellants.

St. Louis Court of Appeals, December 30, 1910.

1. **BILLS AND NOTES: Indorser: Signature on Back of Note.** If one who is neither a payee of a note nor an indorsee thereof signs his name on its back before delivery, he becomes *prima facie* a co-maker, and not an indorser.
2. ———: **Effect of Payment by Co-Maker: Contribution.** The payment of a note by a co-maker extinguishes its obligation and excludes an action thereafter on the note itself, unless re-issued; but such payment confers a right on the maker so paying to sue the other co-makers solely for a contribution of their proportionate part of the amount of the payment, not exceeding the amount of the note, interest and costs.
3. ———: **Payment by Accommodation Indorsers: Subrogation.** The rule that an indorser of a note who pays the same thereby acquires title thereto and may sue the maker on the note itself applies to accommodation indorsers.
4. ———: **Establishing Status as Indorser: Parol Evidence.** In an action against a maker of a promissory note by one who indorsed his name on the back and who paid it to the holder, parol evidence is competent to show he signed the note as an accommodation indorser; but, unless it be established that there was an express understanding he was merely an indorser, he will be considered a co-maker.
5. **APPELLATE PRACTICE: Conclusiveness of Finding.** Where there is substantial evidence to support a finding of the trial court, the judgment with respect to such matter should be affirmed.
6. **BILLS AND NOTES: Establishing Status as Indorser: Evidence: Inferences.** While the word "indorser" is frequently used in a popular way to designate a maker who subscribes his name on the back of a note, as well as an indorser in the technical sense of the term, yet when the parties to the contract, testifying that the indorsement was an accommodation one only, appear to be intelligent business men, knowing the technical import of the term, the trial court may infer that the term was understandingly used.
7. **APPELLATE PRACTICE: Presumption in Aid of Verdict.** On appeal, all reasonable inferences from the testimony and from the appearance and conduct of the witnesses must be considered in aid of the verdict.

Heaton v. Dickson and Trust Co.

8. **CREDITORS' BILL: Equity: Not Necessary to First Reduce Claim to Judgment, When: Trusts.** Where the defendant is a nonresident, and has no property in the state subject to legal process, but is possessed of an equitable estate, plaintiff may seek in equity to sequester the income therefrom without first obtaining a judgment at law and endeavoring to collect the same.
9. **WILLS: Construction: Intent.** In construing a will, the court must ascertain the testator's intention from the provisions of the whole document.
10. **TRUSTS: Limitations Against Alienation and Claims of Creditors: Presumptions: Wills.** While one may by his will settle an estate in trust with an equitable use to another for life, with a limitation against alienation and free from the claims of creditors, the presumption is that he has not done so, unless either express words to that effect are set forth or a clear and undoubted intention to the same end is manifested in the will.
11. **——: Spendthrift Trust: Rights of Creditors: Creditors' Bill: Wills: Construction.** A will directing that testator's wife and children, or their heirs, should receive quarterly from his executor one-fifth each of the net income of his real estate did not create a spendthrift trust, and the income of one of the daughters' share was subject to the right of her creditors in a proceeding in equity in the nature of a creditors' bill or an equitable garnishment.
12. **——: Active Trust: Rights of Creditors.** Creditors of a *cestui que trust* are not inhibited from proceeding against the income from the trust estate merely because the trust is an active one.

Appeal from St. Louis City Circuit Court.—*Hon. James E. Withrow, Judge.*

AFFIRMED.

Harry H. Hacussler and Chas. J. Macauley for appellants.

(1) (a) One who writes his name upon the back of a promissory note of which he is neither payee, nor indorsee, and does so prior to its delivery, is *prima facie* a co-maker, and assumes liability as such in the absence of evidence that it was the understanding at the time that he should be held in some other capacity. Boyer

v. Boogher, 11 Mo. App. 131; Schmidt Malting Co. v. Miller, 38 Mo. App. 251; Rossi v. Schawacker, 66 Mo. App. 67; Oexner v. Loehr, 106 Mo. App. 412, s. c. 117 Mo. App. 698. (b) In the case at bar, plaintiff wrote his name across the back of the note sued on in the first count of his petition prior to its delivery to Rush the payee therein. And since there is no evidence to show that it was the understanding that he was to be held in some capacity other than that of co-maker, it will be presumed that he signed as a co-maker. And his payment of the note at the bank where it had been placed by Rush for collection, extinguished the original debt and cancelled the note. Therefore, plaintiff could not recover in an action on the note the amount he paid the bank; but his action, if any he has, is on the implied promise of the defendant, Dickson, to refund to him the amount he paid the bank to take up the note. Secs. 4504-5, R. S. 1899; Curry v. LaFon, 133 Mo. App. 163; Burton v. Rutherford, Admr., 49 Mo. 258; Reynolds v. Schade et al., 109 S. W. Rep. 632, 131 Mo. App. 1; Burrus v. Cook, 215 Mo. 496; Bauer v. Gray, 18 Mo. App. 170; Williams v. Gerber, 75 Mo. App. 18; Faires v. Cockrell, 88 Texas at p. 436 and cases cited; Gieseke, Admr. v. Johnson, 115 Ind. 310; Burton v. Rutherford, Admr., 49 Mo. 258; Blake v. Downey, 51 Mo. 437; Halliburton v. Carter, 55 Mo. 435. (c) The assignment of the note by Rush, the payee therein, to plaintiff, after it was paid, did not have the effect to resuscitate the note or to vitalize it in the hands of plaintiff so as to enable him to sue and recover on it. Williams v. Gerber, 75 Mo. App. 18; Stevens v. Hannan, 86 Mich. 305; Burton v. Rutherford, Admr., 49 Mo. 258. (2) (a) Before one can maintain a creditor's bill, he must first have exhausted all of his legal remedies. He must show that he has no adequate remedy at law. Davidson v. Dockery, 179 Mo. 687; Wilkinson v. Goodin, 71 Mo. App. 394. (3) It was the intention of John S. Moore, in making his will to create a spendthrift trust, and the

words used by him in his will are sufficient for that purpose and sufficient to show that such was his intention. *Partridge v. Cavender*, 96 Mo. 452; *Smith v. Towers*, 14 Atl. Rep. 497; *Schoenich v. Field et al.*, 73 Mo. App. 452; *Wagner v. Wagner*, 244 Ill. 111; *Baker v. Brown*, 146 Mass. 369; *Burnett v. Burnett*, 217 Ill. 437; *Lampert v. Haydel*, 96 Mo. 439; *Stombaugh's Estate*, 135 Pa. 585; *Kessner v. Phillips*, 189 Mo. 524. In construing wills, the real intention of the testator shall be ascertained and effectuated. Where the idea is clear, the words employed must be read so as to give effect to the intention. *Partridge v. Cavender*, 96 Mo. 452; *Gannon v. Bank*, 200 Mo. 85 and cases cited; *Brooks v. Brooks*, 187 Mo. 476; *Wisker v. Rische*, 167 Mo. 533; *Robards v. Brown*, 167 Mo. 457. (4) The trust created by the will of John S. Moore is an executory or active trust. This being so, neither the principal nor the income thereof can in any way or manner be reached by the creditors of appellant Dickson, nor applied toward the payment of her debts. *Schoenich v. Field*, 73 Mo. App. 452; *Pugh v. Hayes*, 113 Mo. 424; *Jarboe v. Hey*, 122 Mo. 241; *Lampert v. Haydel*, 96 Mo. 439; 1 *Perry on Trusts*, Sec. 386a; *Smith v. Smith*, 70 Mo. App. 449; *Mattison v. Mattison (Oregon)*, 100 Pac. Rep. 4; *Partridge v. Cavender*, 96 Mo. 452.

O. L. Cravens and W. Christy Bryan for respondent.

(1) The law is well established in this state, and universally elsewhere, that the accommodation indorser may recover from the makers, and that his cause of action is on the note itself. *Peers v. Kirkham*, 46 Mo. 146; *Fenn v. Dugdale*, 40 Mo. 63; *Fenn v. Dugdale*, 31 Mo. 580; *Sharp v. Garnet*, 54 Mo. App. 410; 7 *Cyc.* 1020; *Keys v. Keys Estate*, 116 S. W. 537. (2) While a general rule is that a creditor must exhaust his legal remedies before a court of equity will interpose for his

relief, and the proper evidence of that fact is a judgment, execution and return of *nulla bona*, yet, when it appears that the judgment debtor is insolvent, and that the issue of an execution would be of no practical utility, such issue may be dispensed with. *Merry v. Fremon*, 44 Mo. 518; *Turner v. Adams*, 46 Mo. 95; *Luthy v. Woods*, 1 Mo. App. 167; *Carp v. Chipley*, 73 Mo. App. 22; *Burnham v. Smith*, 82 Mo. App. 135; *Luthy v. Woods*, 6 Mo. App. 67. (3) Where a debtor is a non-resident and has no property which can be reached by the ordinary or statutory process, but has funds held by an assignee for the benefit of creditors under the supervision of the court, a creditor's bill will lie without the necessity of first reducing the demand to a judgment and issuing an execution, and in such case it is not necessary to show an actual fraud or an attempt to defraud. *Webb v. Lumber Co.*, 68 Mo. App. 546; *Pendleton v. Perkins*, 49 Mo. 565; *Lackland v. Smith*, 5 Mo. App. 153; *City of St. Louis v. Lumber Co.*, 42 Mo. App. 586; *Humphries v. Milling Co.*, 98 Mo. 542; *Batchelder v. Aetheimer*, 10 Mo. App. 181. (4) The right of plaintiff in this case to have the interest of Mrs. Dickson subjected to the payment of plaintiff's claim in the suit now pending is amply sustained by the following cases: *McIlvane v. Smith*, 42 Mo. 45; *Pendleton v. Perkins*, 49, 565; *Lackland v. Garesche*, 56 Mo. 267.

NORTONI, J.—This is a proceeding in equity in the nature of a creditor's bill or an equitable garnishment. The finding and decree were for plaintiff, and defendant prosecutes the appeal.

Defendant Amanda V. Dickson is the beneficiary of a trust estate, settled to her use by the provisions of her father's will, and the important question for decision relates to a construction of that instrument. But there are other matters urged relating to plaintiff's right of recovery which should be first examined and disposed of. The bill is in two counts, each of which

declares upon a promissory note, executed by defendant in favor of one, Rush, payee, to whose title plaintiff succeeded and of which notes he is now the holder. We will consider the matters urged against plaintiff's right of recovery on the note described in the first count only, as the argument relating to that sued upon in the second does not merit discussion in the opinion. It appears by the note declared upon in the first count that defendant executed the same to J. M. Rush on September 29, 1899. By its provisions, defendant promised to pay Rush \$291.40 three months after date, with interest from date at the rate of eight per cent per annum until paid. On its face, the note recites that it was given for value received and is negotiable and payable without defalcation or discount; in other words, the note is in the usual form of a negotiable promissory note. Plaintiff Warren Heaton is an accommodation indorser thereon, for it appears that he signed his name on the back of the note as such before it was delivered. Afterwards, plaintiff, as such indorser, was required to pay the note, and he now prosecutes this suit against the maker of the note on the note itself, which he acquired by operation of law by discharging his independent obligation as indorser.

It is first argued that the suit on the note may not be maintained by plaintiff for the reason it appears he signed his name on the back of the instrument before delivery. It is said in such circumstances plaintiff is a co-maker of the note instead of an indorser and that therefore, upon paying the note, he extinguished the indebtedness vouchsafed therein and acquired the sole right to sue defendant for contribution on the implied undertaking which always obtains between the parties in such circumstances. The notes in suit antedate our Negotiable Instrument Law of 1905 and with that legislation we are not concerned. Under the rules of decision in this state pertaining to the law merchant, there can be no doubt of the general proposition that if one,

who is neither a payee in the note nor an indorsee thereof, signs his name on its back before delivery, he thus becomes prima facie a co-maker of the note and not an indorser. [Boyer v. Boogher, 11 Mo. App. 130; Rossi v. Schawacker, 66 Mo. App. 67; Oexner v. Loehr, 106 Mo. App. 412, 80 S. W. 690; Schmidt Malting Co. v. Miller, 38 Mo. App. 251; Otto v. Bent, 48 Mo. 23, 26.] It is true, too, that the payment of a note by a co-maker operates to extinguish its obligation and exclude an action thereafter on the note itself unless reissued. In other words, payment of the note by a co-maker confers a right upon him to sue other co-makers solely for a contribution of their proportionate part of the amount of his outlay in that behalf, not exceeding the amount of the note, interest and costs. [Curry v. Lafon, 133 Mo. App. 163, 113 S. W. 246; Williams v. Gerber, 75 Mo. App. 18.] But though such be the rule as to a co-maker, it is not so with an indorser. Contribution alone lies between co-makers because of the contractual privity which obtains between them, and there is no such privity between the maker of a note and a mere indorser, though there be an equitable right in the indorser to be subrogated with respect to collateral deposited by the maker of the note for its security. The undertaking of the indorser is wholly independent of that of the maker of the note, for by it he renders himself independently liable to the holder of the instrument and his right to subrogation inures on payment of the note through the privity between him and the holder of the note and collateral. It is therefore the rule that an indorser who pays the note acquires title thereto by such payment and may, of course, sue the maker on the note itself. The principle obtains alike to accommodation indorsers, for their rights and liabilities are the same as others. [Fenn v. Dugdale, 40 Mo. 63; 7 Cyc. 1020, 1021.] The precise question for decision with respect to this matter therefore is, as to whether plaintiff appears to be a co-maker or an indorser of the note in suit. Parol evidence is

competent in the circumstances of the case to show the relation plaintiff assumed, and the rule above stated as to one who is neither payee nor indorsee, signing his name on the back of the note before delivery, pertains only to the prima facie liability of such party. But it is said unless an express understanding appears that the party signed his name as indorser, he will be treated, and his rights determined, as though he is a co-maker, for such is the obligation which the law imports. [Oexner v. Loehr, 106 Mo. App. 412, 80 S. W. 690; Otto v. Bent, 48 Mo. 23, 26; Rossi v. Schawacker, 66 Mo. App. 67; Boyer v. Boogher, 11 Mo. App. 130; Schmidt Malting Co. v. Miller, 38 Mo. App. 251.] The express understanding referred to, lying as it does, in parol testimony, is peculiarly a matter within the province of the trial court and it must be viewed in this instance from the standpoint of after judgment affirming such express understanding, for the court found the issue for plaintiff as though such express understanding was had. If there is substantial evidence to support it, the judgment with respect to that matter should be affirmed. Both plaintiff and Rush, the payee of the note, pointedly testified that plaintiff affixed his signature on the back of the note as accommodation indorser only and no one gave testimony to the contrary. Indeed, plaintiff and Rush, the payee, to whom the note was originally made, were the only witnesses who spoke upon this subject at all. Plaintiff and Rush were the sole parties to the contract, if it were one of indorsement, for, in this case, such is an independent undertaking between the indorser and the payee, Rush, to whom the promise was made. Plaintiff and Rush were certainly competent to speak on the subject and it appears they agree as to the terms and character of plaintiff's undertaking. It is true that the employment of the word "indorser", in a conversation between the parties at the time the contract was made is not conclusive as a matter of law, for the word "indorser", in a popular way, is frequently used

to designate a maker who subscribes his name on the back of the note as well as an indorser in the technical sense of the term. [Oexner v. Locher, 106 Mo. App. 412, 80 S. W. 690.] But when the party or parties to the contract, giving testimony with respect to such an undertaking, appear to be intelligent business men who know the technical import of the term, "indorser", we believe such appearances is a circumstance for which the trial court may infer the term was understandingly used. In this view, the judgment finding the express understanding may be sustained, for besides the words of the witness, all reasonable inferences from them and the appearance and conduct of the witness on the stand are to be considered in aid of the verdict. It is clearly a question for the trier of the fact and there is abundant evidence in the record to support the finding that plaintiff signed the note with the understanding that he was to assume the liabilities and enjoy the privileges of an accommodation indorser only. [See Rossi v. Schawacker, 66 Mo. App. 67.] Plaintiff having sustained the relation of indorser, instead of co-maker, the payment of the note by him operated to vest its title in him as a consequence, of course, authorized his suit on the note.

It is next argued that even if plaintiff may maintain a suit on the note in a court of law, he is not permitted to do so in a court of equity. It is said that though the proceeding seeks to sequester defendant's income from a trust estate, which is peculiarly a matter of equitable cognizance, and the court may decree the payment of a debt from that source in some cases, this suit must fail for the reason it does not appear plaintiff has exhausted his remedy at law. The suggestion is that before seeking relief in this proceeding plaintiff should have obtained a judgment at law on the note and endeavored to collect the same by the usual process. It is unnecessary to consider this argument further than to say that an exception to the rule invoked exists in

cases where it appears the defendant is a non-resident of the state and has no property here subject to legal process but is possessed of an equitable estate in Missouri. The proof is conclusive that defendant debtor, Mrs. Dickson, is now and has been for several years, a non-resident of this state; that after diligent search in that behalf, no property of hers whatever may be found subject to execution or attachment at law. Except for her equitable estate in the income from the trust property, she is insolvent under our law. It seems to be a precept of public policy that a state will aid its citizens in the collection of debts from non-resident insolvents who may chance to have some property rights within its borders. Acting on this principle, courts of equity frequently entertain a proceeding on the original indebtedness when no judgment at law has been obtained thereon and sequester funds or property in the state to the payment of the debts of such non-resident persons owing to its citizens. Our own Supreme Court, in an able and well considered opinion, has given effect to the rule in its broadest scope. [See *Pendleton v. Perkins*, 49 Mo. 565; see, also, *Lackland v. Smith*, 5 Mo. App. 153; *Humphreys v. Milling Co.*, 98 Mo. 542, 10 S. W. 140; *Webb v. Lumber Co.*, 68 Mo. App. 546.] The mere fact that plaintiff omitted to first reduce his notes to judgment is unimportant in the circumstances of the case, for if the trust properly may be sequestered, the court will award complete relief, notwithstanding there is no judgment at law, on its appearing, as it does, that defendant debtor is a non-resident of the state, who possesses no property here, subject to legal process; for why the additional trouble and expense of a suit and execution at law when it is clear no property exists subject to seizure thereunder?

By his last will, John S. Moore, father of defendant Amanda V. Dickson, settled a trust to her use by vesting the legal title to certain real property in his execu-

tor, John Maguire, with the direction, substantially, that said Maguire manage the property, collect the rents, pay taxes, repairs, etc., after which Mrs. Dickson should receive quarterly from the executor one-fifth of the net income from the rental of such real estate for the period of her natural life. Maguire, having departed this life, the Mississippi Valley Trust Company was duly appointed in his stead to administer the trust and it appears such trustee now has in its possession a considerable amount of money as Mrs. Dickson's one-fifth share of the net income from the trust estate. This proceeding seeks to impound and sequester a sufficient amount of such income to discharge the indebtedness owing by Mrs. Dickson to plaintiff and the costs incident thereto. The court impounded a sufficient amount of the funds referred to and appointed the Mississippi Valley Trust Company receiver to take and hold the same *pendente lite*. Afterwards, by its decree, the court directed payment of plaintiff's claim and costs from Mrs. Dickson's income from the trust estate.

It is argued by defendant that such income is immune from the claims of creditors for the reason the donor created a spendthrift trust by his will. It is said though the will contains no express words inhibiting the *cestui que use* from anticipating or alienating her one-fifth part of the net income from the estate or withdrawing it from the grasp of her creditors, it nevertheless manifests an intention to that effect sufficient for the purpose suggested. A consideration of the argument advanced, of course, involves an interpretation of the provisions of the will touching upon the trust. While it is the duty of the court to ascertain the intention of the testator from the provisions of the whole document, it is conceded by all concerned that the fourth section of the will alone is important; and that no words contained in other parts thereof suggest anything relevant to the matter in judgment. The portion of the will referred to is as follows:

"Item 4th. I desire that my real estate in the city of St. Louis, Missouri, and in Cairo, Illinois, shall continue to carry the incumbrance which may be upon the same at my death, during the lifetime of my children, and that my wife and my children, or their heirs shall receive quarterly from my executor one-fifth each of the net income from the rental of my real estate (the children of my daughter, Mrs. M. M. Thornton, deceased, receiving her fifth). After the death of the last of my children, I desire that my real estate shall be sold to the best advantage and the proceeds equally divided among my wife or her heirs, and my grandchildren or their heirs living at that time."

That the will contains no express words of limitation against the right of the *cestui que trust* to anticipate or alienate her portion of the income from the trust property or withdraw it from the claims of creditors is obvious. Indeed, so much is conceded. But it is said that as the settler directed that his wife and children, or their heirs, should *receive* quarterly from his executors one-fifth each of the net income from the rental of the real estate settled in trust, and it appears such arrangement was to continue until the death of the several beneficiaries, it is obvious his intention was to restrict the right of alienation and place the net income of the estate beyond the reach of creditors. There can be no doubt that in construing a will the intention of the testator is the polar star by which the court must be guided, and if it appears from reading the whole instrument that John S. Moore intended to create a trust for the purpose suggested, such intention should be effectuated by declaring the result accordingly. [Partridge v. Cavender, 96 Mo. 452, 9 S. W. 785; 26 Am. and Eng. Ency. Law (2 Ed.), 141, 142.] But such intention in the instant case must be clear and undoubted, for the reason the principle advanced operates to fetter the transmission of property and render a valuable estate unavailable as a means of compensating just

debts. The policy of the law, in a measure, forbids such result, though it recognizes the right of a donor of a bounty to restrict it by reasonable limitations. Indeed, by the law of the mother country, from whence our system of jurisprudence is entailed as a heritage, one may not, as a rule, create a life estate in another except he confers with it all of the incidents which usually attend the same. It is the rule in England that a donor cannot create a life estate dissevered from the usual incidents of such estate which includes the power of voluntary alienation and the consequent liability of the estate for debts, unless the instrument itself provides for the cesser or defeasance of the estate upon an attempted alienation or *in invitum* as by an act of bankruptcy, or unless, if it be a trust estate, a mere use be created at the discretion of the trustees and the beneficiary is wholly without power to control such discretion. [Brandon v. Robinson, 18 Ves. 433; 26 Am. and Eng. Ency. Law (2 Ed.), 138, 139; 2 Perry on Trusts (5 Ed.), sec. 827a.] There is an exception to the English rule, however, with which we are not concerned, in favor of trusts created for married women. [1 Perry on Trusts (5 Ed.), sec. 387.] Though the English rule in its broad significance, which is in aid of free alienation and the claims of creditors, has not been accepted generally in this country, its policy nevertheless prevails at least to the extent that grants of property and settlements in trust are to be taken *prima facie* as unhampered with limitations and unencumbered with conditions unless such an intention clearly appears. The courts of a number of American states, among them those of Rhode Island, South Carolina and North Carolina, adhere to the English rule but others have questioned and rejected it in so far as to say that while estates thus granted are to be regarded *prima facie* as unencumbered with any limitations whatever, it is competent for the donor to effect such reasonable limitations upon the equitable use as he may choose, provided the rule against perpetuities is not

impinged or the interest created otherwise illegal. Foremost among the American authorities on the question, is the case of *Nichols, Assignee, v. Eaton*, 91 U. S. 716, where, in an opinion by Mr. Justice MILLER, the subject is expounded and much elucidated on principle. The Missouri courts and others adhere to what is known as the American Rule so forcibly expounded in *Nichols v. Eaton*, *supra*. [See *Lampert v. Haydel*, 96 Mo. 439, 9 S. W. 780; *Pickens v. Dorris*, 20 Mo. App. 1; *Lampert v. Haydel*, 20 Mo. App. 616; *Jarboe v. Hey*, 122 Mo. 341, 26 S. W. 968.] Other authorities to the same effect are *Hyde v. Woods*, 94 U. S. 523; *Broadway Nat'l Bank v. Adams*, 133 Mass. 170; *Sears v. Choate*, 146 Mass. 395; *Maynard v. Cleaves*, 149 Mass. 307; *Tilton v. Davidson*, 98 Me. 55; *Warner v. Rice*, 66 Md. 436; *Wenzel v. Powder (Md.)*, 59 Atl. 194; 1 *Perry on Trusts* (5 Ed.), sec. 386a; 26 *Am. and Eng. Ency. Law* (2 Ed.), 139, 140, 141, 142; *Kunkel v. Kemper*, 32 Pa. Supr. Ct. 360; *Fisher v. Taylor*, 2 *Rawl (Pa.)* 33; *Shankland's Appeal*, 47 Pa. St. 114; *Jourolmon v. Massengill*, 86 Tenn. 81, 5 S. W. 719. It therefore appears that though one may settle an estate in trust with an equitable use to another for life, with a limitation against alienation and free from the claims of creditors, the presumption of the law is that he has not done so, unless either express words to that effect are set forth or a clear and undoubted intention to the same end is manifested in the will. If there are no express words in the will affixing a restraint against alienation and withholding the income from creditors, other language relied upon as reflecting such intention must import it to be clear and undoubted. [*Maynard v. Cleaves*, 149 Mass. 307, 308, 309; *Sears v. Choate*, 146 Mass. 395, 398; *Tilton v. Davidson*, 98 Me. 55, 58; *Lampert v. Haydel*, 20 Mo. App. 616; *Pickens v. Dorris*, 20 Mo. App. 1; 26 *Am. and Eng. Ency. Law* (2 Ed.), 141, 142.]

It is sometimes said in favor of the English rule, above referred to, that it is just, for the reason creditors

are not mislead by the fact that one having an abundance of means from the income of an estate may finally be ascertained to have no property against which their claims can be enforced. Under that rule, the income may be both alienated and appropriated for debt. Indeed, the principle which inheres in the English doctrine is in the interest of creditors for wherever there resides the power to alienate property that which may be alienated is liable for the debts of the person having the right of alienation unless otherwise exempted. [Warner v. Rice, 66 Md. 436.] However, the same consideration for creditors does not prevail with us, for throughout the states of the American Union a public policy has been declared in favor of the debtor and his right of support to a certain extent, notwithstanding the claims of creditors against him. Such public policy is manifested in the exemption statutes of the various states. Besides our registration laws require all such documents as wills and deeds to be spread of record, with a view to public notice of the rights acquired by the donee and the purpose intended by the donor. A creditor may ascertain the facts by an examination of such records and if he sees fit to advance credit without so doing is very justly deemed to have acted at his peril. These considerations constitute an element to be reckoned with by the court in determining the true principle to be applied in matters of the character here in judgment. [See Nichols v. Eaton, 91 U. S. 716; Pickens v. Dorris, 20 Mo. App. 1.] From this it is obvious that a will or other instrument, settling a trust in favor of another, without express words of limitation in respect of the power of alienation or of the rights of creditors, should manifest an intention to that effect sufficiently clear and undoubted to afford reasonable notice, through the medium of the registration laws, to the world at large. Such we believe to be the sound doctrine on the subject, otherwise persons may be mislead into dealing with the *cestui que trust* on the credit of an equit-

able estate which is restrained as to alienation and the rights of creditors. In keeping with this doctrine, the Supreme Court of Maryland, in *Wenzel v. Powder*, 59 Atl. 194, declared that though an instrument created a trust estate in favor of another for life, the words that it was "for support and maintenance" alone were insufficient to point a clear and undoubted intention on the part of the settler of the trust to restrain the equitable interest in the income for alienation or remove it beyond reach of creditors. The court said the words "for support and maintenance" in and of themselves do not characterize a spendthrift trust. So the Supreme Court of Massachusetts, in *Maynard v. Cleaves*, 149 Mass. 307, determined that as the income of an estate was conveyed to the widow for life "to her use and benefit"—"for her comfort and support"—such words were insufficient to withdraw the income from creditors. The court said such words were of themselves without force as a limitation upon the absolute gift of the income from the estate. In *Girard Life Ins., etc., Co. v. Chambers*, 46 Pa. St. 485, the Supreme Court of Pennsylvania declared that though the will directed the trustee to "collect and receive the rents, issues, interest and income from the estate" and after deducting expenses "to pay over the same unto the *cestui que trust* for his own use and benefit or to such person as by his order in writing he may authorize to receive the same" a spendthrift trust was not created thereby. The income of the estate was determined to be subject to the claims of creditors for the reason the testator had not sufficiently manifested an intention against the right of the *cestui que trust* to anticipate or alienate the same or withhold it from creditors. [See, also, *Pickens v. Dorris*, 20 Mo. App. 1; *Kingman v. Winchall*, 20 S. W. 296.] The case last cited is a judgment of our Supreme Court in point but we have been unable to find it in the official reports. However, upon inquiry, the Clerk of the Supreme Court informs us the opinion is on file there and that it has never been

withdrawn. In view of this fact, it is the rule of decision in this state, though not officially reported. Both on principle and authority, it is entirely clear that the testator omitted to express a clear and undoubted intention to the effect that his purpose was to restrain Mrs. Dickson from either anticipating or alienating her share of the net income from the trust estate or that it should not be available to creditors for her debts. The mere direction "that my wife and my children or their heirs shall receive quarterly from my executors one-fifth each from the net income of my real estate" is not sufficient to signify an intention to create a spendthrift trust nor to impart reasonable notice of such a purpose.

But it is said, though there appears no spendthrift trust was created, the trust is an active one beyond question and for this reason the income is not subject to the claims of a creditor. It seems such was stated to be the law by this court in *Schoeneich v. Field*, 73 Mo. App. 452. Such is an erroneous view, indeed. There can be no doubt that the will discloses an active trust in contradistinction to a dry one, for it imposes active duties of a substantial character upon the trustee, but we are familiar with no principle of our jurisprudence which inhibits the rights of creditors to proceed in equity against the *income* from the trust estate because of the mere fact that the trust is an active one. The case declaring the doctrine seems to rest the decision to that effect upon *Pugh v. Hayes*, 113 Mo. 424, 21 S. W. 23, from which a considerable excerpt of the opinion is copied. But, upon scrutinizing the opinion of the Supreme Court in that case, it is obvious that no such principle was declared. In *Pugh v. Hayes*, an estate in land had been settled in favor of the testator's widow with the title in the executor trustee. Under the terms of the will, the widow was to enjoy the use and benefit of the land during her natural life in lieu of dower. A judgment at law had been obtained against the widow, *cestui que trust*, and the proceeding in judgment was in equity

seeking to appropriate the land, *the corpus of the estate*, to the payment of the judgment at law against the widow. Of course, if it were a trust at all permissible under the law, the legal title to the land resided in the trustee and could not be divested on a judgment against the widow, *cestui que trust*. The only theory on which the land, or corpus of the trust estate, might be appropriated on the debt of the *cestui que trust* was that the trust was a dry one imposing no active duties upon the trustee and therefore executed by our statute of uses. Under that statute, if lands be conveyed to a trustee, for the use of another, with no purpose other than for the trustee to hold the title and without any active duties enjoined, the trust immediately becomes executed by vesting the entire estate in the beneficiary. [Sec. 2867, R. S. 1909; *Carter v. Long*, 181 Mo. 701, 81 S. W. 162.] That such was the only question in judgment before the Supreme Court is clearly stated in the opinion and the court reasoned to the effect that as the trustee was charged with the duty of paying taxes and some other matters, the trust was an active one and therefore not executed by the statute of uses by merging the entire estate in the widow, *cestui que trust*, against whom the judgment at law was had. Because there appeared an active trust in that case, the right of the plaintiff to appropriate the corpus of the estate was denied. But that opinion in its concluding lines reserved judgment as to the matter of appropriating the income of the estate to the payment of the plaintiff's debt, for, as said, that question was not made in the case. That case was, of course, properly decided, but it is not authority for the question in judgment in *Schoeneich v. Field*, 73 Mo. App. 452, which pertained alone to the *income* from the land settled in trust to the use of Field, the *cestui que trust*. In such circumstances, the matter should have been decided by determining the proposition as to whether or not a spendthrift trust appeared and not as to whether it was an active one, for the statute of

uses was not involved. In the case last mentioned, the court also cited *Lampert v. Haydel*, 96 Mo. 439, 9 S. W. 780; *Jarboe v. Hey*, 122 Mo. 341, 26 S. W. 968. But those cases do no more than to declare the doctrine heretofore discussed that it is competent for a donor to settle his property for the use of another for life with a limitation against alienation by the *cestui que trust* and restrict the rights of creditors. *Schoeneich v. Field*, supra, is not in accord with the established principle which points the determination of such matters, nor is it supported by authority. That case stands alone in the books asserting the doctrine suggested. It should be overruled and the judgment of the circuit court should be affirmed. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

LOTTIE M. RIGBY, Appellant, v. ST. LOUIS TRANSIT COMPANY et al., Respondents.

St. Louis Court of Appeals, December 30, 1910.

1. **NEGLIGENCE: Injury by Tie Carelessly Handled on Street Crossing: Negligence, Question for Jury.** In an action for personal injuries alleged to have been sustained by plaintiff by reason of a tie, which was being precipitated into a trench on a street crossing, striking her, evidence held sufficient to prove defendant was negligent in precipitating the tie forward upon the crossing for pedestrians without making a careful observation to see whether persons were present who were likely to be injured thereby.
2. **——: ——: Contributory Negligence, Question for Jury.** In an action for personal injuries alleged to have been sustained by plaintiff by reason of a tie, which was being precipitated into a trench on a street crossing, striking her, held, evidence for defendant tending to show that plaintiff was fully aware that ties were being thrown into the trench, but nevertheless moved forward in the face of the impending danger, which was open to her view, was sufficient to prove plaintiff was remiss in her duty to exercise ordinary care.

3. **NEW TRIAL: Excessive Verdict: Setting Aside: Discretion of Court.** It is the positive duty of a trial judge to set aside the entire recovery, where he is convinced from what appeared at the trial that the verdict was the result of passion and prejudice on the part of the jury, and it is not necessary that he first suggest a proper remittitur by plaintiff.
4. **APPELLATE PRACTICE: New Trial: Discretion of Lower Court.** The discretion of the trial court in supervising and setting aside verdicts, on matters pertaining to the facts, will not be reviewed on appeal, unless such discretion has been abused or arbitrarily exercised.
5. ———: ———: ———: **Absolute Right to Grant One New Trial.** Where but one new trial has been granted and the trial court has awarded it because of a decision of matters *in pais*, the verdict will not be reinstated on appeal, if there appears substantial evidence to sustain a verdict for the party to whom the new trial was awarded.
6. **NEW TRIAL: Errors of Law.** While only one new trial may be awarded a party on the judgment of the trial court with respect to the facts of the case, matters of law are always open to review.

Appeal from St. Louis City Circuit Court.—*Hon. M. N. Sale, Judge.*

AFFIRMED AND REMANDED.

Albert E. Hausman for appellant.

(1) The verdict of the jury was not excessive, but all things considered is reasonable and just. Verdicts as follows have been sustained in this state. *Bolton v. Mo. Pac.*, 172 Mo. 92; *Goldsmith v. Holland Bldg. Co.*, 182 Mo. 597; *Taylor v. R. R.*, 16 S. W. 206; *Griffin v. R. R.*, 98 Mo. 108; *Ridenour v. R. R.*, 102 Mo. 270; *Latson v. St. Louis Transit Co.*, 192 Mo. 449. (2) When the trial court or appellate court on appeal considers a verdict excessive it is in the interest of justice that a remittitur be ordered and that judgment be entered for the amount of the verdict less the remittitur. *Bragg v. R. R.*, 192 Mo. 366; *McGraw v. O'Neil*, 101 S. W. 132; *Nicholls v. Crystal Plate Glass*, 126 Mo. 55; *Barnes v. Lead Co.*,

107 Mo. App. 608; Phippin v. R. R., 196 Mo. 321; Sec. 866, R. S. 1899; Chandler v. Gloyd, 217 Mo. 394.

Boyle & Priest and *T. M. Pierce* for respondents.

With the evidence as conflicting as it was in this case, and with the damages so exceedingly excessive that counsel for the appellant virtually make such a confession, how can this court say that the trial court abused its discretion in the granting of a new trial? *Kelleher v. Railroad*, 126 S. W. 796; *Loftus v. Railroad*. 220 Mo. 470; *Kirn v. Iron Co.*, 124 S. W. 45; *Schutte v. Railroad*, 108 Mo. App. 21.

NORTONI, J.—This is a suit for damages accrued to plaintiff on account of personal injuries received through the alleged negligence of defendant. The finding and judgment were for plaintiff, but the court set the verdict aside on defendant's motion, and from this order plaintiff prosecutes the appeal.

It appears plaintiff was injured on defendant's street car tracks at the point where the public crossing for pedestrians on Prairie avenue crosses the tracks in Florissant avenue. Both streets are public thoroughfares of the city of St. Louis. Defendant's car tracks run north and south about the center of Florissant, and Prairie avenue is said to cross Florissant from east to west. At the time of plaintiff's injury, defendant was reconstructing the bed of its tracks in Florissant avenue and to that end had removed the surface of the street between the rails of the track and immediately adjacent thereto on the outside of the same. Plaintiff, a pedestrian, walked southward on Florissant avenue and turned to cross that street at the usual crossing place but one of defendant's cars then discharging a number of passengers stood with its rear platform immediately upon the crossing where plaintiff desired to pass. Defendant had lodged several railroad ties at

the point of the crossing for pedestrians between the rails of its track where the surface was excavated, for the purpose of enabling persons to pass over the same. The evidence for plaintiff tends to prove that she approached the point of crossing and stood for a few seconds until the car there standing passed to the northward. Immediately upon the car moving forward, she stepped upon the track, in progressing westward, just as one of defendant's track-men from the opposite side of the track threw a railroad tie from his shoulder into the excavation between the tracks immediately before her. It seems defendant's servant with the tie on his shoulder was standing immediately on the west side of the car awaiting its departure while plaintiff stood on the east. So standing, of course, the rear end of the car was between plaintiff and defendant's servant and the view of each was obstructed so far as the other was concerned. The tie, upon being thrown by defendant's trackman into the excavation between the rails of the track, bounded and inflicted injuries upon plaintiff's knee and arm. There is evidence tending to prove that the injuries suffered by plaintiff are severe and permanent. But there is evidence for defendant tending to prove plaintiff's condition is the result of a rheumatic trouble which antedated the injury received from the rebound of the tie. Plaintiff testified one of her limbs was considerably enlarged about the knee as a result of the injury, but an eminent physician, commissioned by the court for the purpose, after an examination, gave testimony to the effect that he was unable to discover any measurable enlargement of the limb referred to and that he found nothing indicating a permanent injury.

While there is ample evidence tending to prove defendant's servant was negligent in precipitating the tie forward upon the crossing for pedestrians without making a careful observation after the car passed forward as to whether persons were present and likely to be in-

jured thereby, there is substantial evidence, too, to the effect that plaintiff was careless in her own conduct. The evidence shows that the car tracks were in the course of reconstruction and that the excavation between the rails and between the two tracks of defendant was being filled with ties at the time to enable persons to cross the same, and of this plaintiff was fully advised. In the circumstances stated, of course, it devolved upon her to exercise that degree of care which usually attends the conduct of an ordinarily prudent person in the same situation for her own safety, and the proof for defendant tends to show that she moved heedlessly forward without care and was nearly across the track at the time the tie was thrown and rebounded upon her. In other words, there is evidence tending to prove plaintiff was remiss in her duty to exercise ordinary care by moving forward in the face of an impending danger which was open to her view after the car passed from the crossing.

The court submitted the question of plaintiff's contributory negligence, if any, and instructed the jury as well that if the negligence of both parties concurred in the injury, no recovery could be had. There can be no doubt that if the jury had found the issue for defendant as though plaintiff was careless for her own safety or that her want of care concurred with that of defendant as the occasion of her injury, the verdict would find substantial support in the evidence adduced. But the jury found the issue for plaintiff as though defendant was negligent while she was duly careful in all respects, and awarded her a recovery of \$7500. On defendant's motion, the court set the verdict aside and entered an order of record to the effect that it did so "because the verdict is so grossly excessive in amount as to indicate that it is the result of passion and prejudice."

It is argued here that the court erred in thus setting the verdict aside without first suggesting a proper

remittitur, for it is said it may be plaintiff was entirely willing to forego a portion of the recovery in order to conclude the litigation. We are not so persuaded, for with respect to such matters, the trial court is vested with a large discretion and in the very nature of the grant of such discretion to the presiding judge a positive duty rests upon him to set aside the entire recovery when he is convinced from what appears at the trial that the verdict is the result of passion and prejudice on the part of the jury. It is the purpose of the law to approximate a just result between parties litigant and it goes without saying that such purpose is not effectuated when passion and prejudice enter into the award. A verdict which in amount of damages awarded indicates passion and prejudice to the mind of the court may be so infected with improper motive and contaminated with an ulterior purpose as to suggest no recovery whatever would be allowed on the cause of action stated if a fair consideration of the case were had by a just and unbiased jury. No one can doubt the duty of the court in such circumstances, and the full measure of its performance ought not to be disturbed on appeal by another tribunal which has no opportunity to see and consider the parties and witnesses together with their conduct and appearance on the stand, unless a clear abuse of a sound judicial discretion appears. Moreover, if in the judgment of the trial court the verdict is the result of passion and prejudice on the part of the jury, then certainly no just criterion exists to suggest a proper remittitur. A remittitur ordered in the circumstances suggested would proceed quite beyond a conservative administration of the law and amount to no more than the guess of a competent lawyer on a question which, under our jurisprudence, is exclusively within the province of a jury of fair and unbiased laymen. But aside from this entirely, it is a rule of decision with us that as to the matter of supervising and setting aside verdicts on matters pertaining

to the facts of the case the discretion of the trial court will not be reviewed unless it appears such discretion has been abused or arbitrarily exercised. A distinct rule obtains even beyond this, however, in respect of the action of the trial court in granting but one new trial in a case as here. Where but one new trial has been granted, as in this case, and the trial court awards it through giving its judgment on matters *in pais*, the verdict will not be reinstated on appeal nor the discretion of the trial judge reviewed if there appears in the record substantial evidence to sustain a verdict in favor of the party to whom the new trial is awarded. In other words, in such circumstances, if the case is one in which the proof tends to show a cause of action or a substantial defense which might on a fair trial be accepted by the jury and acted upon in favor of the party to whom the new trial is granted, the appellate court will decline to interfere. This rule obtains, of course, only in cases where there has been but one new trial awarded to the party and it was granted on the judgment of the trial court with respect to the facts in the case, for as to matters of law, such are always open to review. [Loftus v. Met. Street Ry. Co., 220 Mo. 470, 119 S. W. 942; Seeger v. St. Louis, etc., Co., 193 Mo. 400, 91 S. W. 1030; Graney v. St. Louis, I. M., etc., Ry. Co., 157 Mo. 666, 57 S. W. 276; Schuette v. St. Louis Transit Co., 108 Mo. App. 21, 82 S. W. 541; Kelleher v. United Rys. Co., 147 Mo. App. 553, 126 S. W. 796.]

It is obvious there was substantial evidence before the jury tending to prove plaintiff's negligence concurred with that of defendant in producing the injury and no one can doubt that had the verdict been for defendant on that score, it would be affirmed on appeal if the case were otherwise without error. This being true, the discretion of the trial court will not be reviewed nor its judgment on such discretionary matter disturbed.

Plaintiff relies upon Chandler v. Gloyd, 217 Mo. 394, 116 S. W. 1073, and insists this case falls within

the rule of that one. We have been unable to discern anything in the opinion of the Supreme Court in that case which in the least impairs the rule of decision heretofore referred to. That case decides no more than that where it appears a verdict has been recovered by plaintiff and a remittitur ordered which order of remittitur has been acceded to by plaintiff and entered and thereafter, notwithstanding the court sets the entire verdict aside on the ground that plaintiff was not entitled to recover at all, the appellate court on reviewing the plaintiff's appeal from the order setting aside the entire verdict may, if it finds the cause of action in favor of plaintiff sufficiently established by the proof and no error of law on the trial, order a reinstatement of the verdict less the remittitur entered by plaintiff in obedience to the order of the trial court prior to its second order awarding a new trial because of the insufficiency of the evidence. The relevant features of the case referred to, when analyzed, present nothing more than an excessive verdict with remittitur ordered by the trial court and acceded to by the plaintiff. In such circumstances, it appears the discretion of the trial court had been exercised on reviewing the verdict as to what was a proper amount of recovery on the facts of the case if the plaintiff was entitled to recover at all. This being true, of course, there was no sound reason which would require a remand of the cause and a retrial of the issue, for on review the Supreme Court ascertained no error had been committed and the plaintiff was entitled to a verdict which had been properly supervised by the trial court and remittitur entered. The judgment setting aside the verdict and granting a new trial should be affirmed and the cause remanded. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

STATE OF MISSOURI, Respondent, v. JOSEPH
ROSWELL, Appellant.

St. Louis Court of Appeals, December 30, 1910.

1. **CRIMES AND PUNISHMENTS: Conclusiveness of Finding.** A judgment of conviction, in a criminal prosecution, is conclusive, although there is only slight evidence to support it.
2. **LARCENY: Necessity of Proving Ownership.** To constitute "larceny," the thing stolen must be the property of another; but either general or special ownership may be sufficient.
3. ———: **Necessity of Proving Ownership as Laid.** Ownership of property stolen must be proved as charged, except that there may be an immaterial variance under the statute.
4. ———: ———. To convict of larceny of money from a pocketbook, ownership of the money must be proved as charged; proof of ownership of the pocketbook being insufficient.
5. ———: ———: **Evidence: Presumptions.** The presumption of accused's innocence of stealing money of a particular person from a pocketbook cannot be overthrown by a presumption that that person owned the money because it was in a pocketbook shown to be his.
6. **CRIMES AND PUNISHMENTS: Evidence: Presumption of Innocence: Presumption Against Presumption.** It being presumed by the law that all persons are innocent of the offense charged, until facts or circumstances affording a legitimate inference to the contrary are shown, one may not be convicted of a crime upon a mere prima facie case, established through the medium of presumptions raised by the law, since a presumption of that character will not be allowed to overthrow or destroy the effect of the presumption of innocence.

Appeal from St. Louis Court of Criminal Correction.—
Hon. Benjamin J. Klene, Judge.

REVERSED AND REMANDED.

Thos. B. Estep for appellant.

(1) The court erred in not discharging appellants at the conclusion of the state's case. The evidence is

circumstantial and inconclusive both as to the *corpus delicti*—the loss of the property by means of a larceny and the agency of appellants therein. State v. Johnson, 209 Mo. 357; State v. Francis, 199 Mo. 671; 1 Bishop's Criminal Procedure (2 Ed.), secs. 1050-71; Rice on Evidence, secs. 292-293, 342-356. (2) It is manifest that if the prosecuting witness lost the property in the manner the state contends then it was taken by one, but which one? And in the absence of evidence of any conspiracy, how can both or either be held? 1 Bishop on Criminal Proc. (2 Ed.), sec. 106. (3) We respectfully urge that this case comes within the doctrine announced in case of State v. James, 133 Mo. App. 300.

Philips W. Moss for respondent.

NORTONI, J.—Defendant was convicted of the offense of petit larceny and from that judgment prosecutes an appeal.

One, David Sorrells, from whom the money is alleged to have been stolen and in whom the property right is laid, gave testimony for the state as follows: Sorrells said he lived at the Buckingham Annex and upon leaving there about seven o'clock on the morning of July 16th, he had a ten dollar bill in his pocketbook, which pocketbook he carried in his hip pocket. On arriving at Eighteenth street about seven-thirty, he left the Laclede car, on which he was riding, with the purpose to transfer on a Park avenue car going north on Eighteenth street. Upon alighting from the Laclede car, he saw defendant and one, Downey, standing on the corner. When the Park avenue car approached from the south, he, in company with several others, was in the act of boarding the same and felt himself pushed by defendant and Downey immediately behind him and, indeed, felt defendant's hand or arm in the region of his back. Both defendant and Downey boarded the car as he did and rode a couple of blocks north when

they left it. After defendant and Downey had left the car, the witness missed his pocketbook in which was contained the ten dollar bill, and he surmised that the men who pushed him on boarding the car had gotten it. Witness knew he had a ten dollar bill in his pocketbook on leaving his boarding place about seven o'clock and knew both the bill and pocketbook were missing from his pocket about thirty minutes thereafter, which was a few minutes after defendant and Downey left the car on which he was riding. On complaint being made to the police, a description of the two men was given and they were arrested a few days thereafter at Forest Park Highlands. There is no evidence that the money or pocketbook was found upon either. Defendant Roswell was found guilty and his punishment fixed at one year in the workhouse notwithstanding the master of the Union Market gave testimony positively for him to the effect that at the time in question defendant was engaged at his usual occupation in cleaning up the market where it is said he worked every day. At best, it must be said that there is only slight evidence to support the judgment of conviction, but we regard the identity of defendant, his being present at the point in question and the matter of sleight-of-hand performance which operated to relieve Sorrells of his pocketbook, as concluded by the judgment, for these were matters to be determined by the court from the facts and circumstances in proof as detailed by the witnesses on the stand.

However, the judgment must be reversed for the reason the record is entirely barren as to the ownership of the ten dollar bill. The precise charge against defendant is that he stole ten dollars, lawful money of the United States, the property of David Sorrells, then and there being. Under any and every definition of the crime of larceny, the thing stolen must be the property of another though either a general or special ownership may be sufficient. [State v. Moore, 101 Mo. 316, 14

S. W. 182; 2 Bishop's New Criminal Law (8 Ed.), sec. 758; sec. 4535, R. S. 1909; sec. 4549, R. S. 1909.] The ownership of the property said to have been stolen is descriptive of the offense and as such must be proved as laid in the indictment unless it be in the case of an immaterial variance under our statute. [Bishop's New Criminal Procedure (4 Ed.), sec. 718; State v. Crow, 54 Mo. App. 208; State v. Nelson, 101 Mo. 477, 14 S. W. 718; State v. James, 133 Mo. App. 300, 113 S. W. 232.] But in this case, there is no question of variance presented, for the information charges the money stolen to be the property of David Sorrells and the proof offered is insufficient to show it was his property or that of any one else. Indeed, there is not a suggestion in the record as to who owned the money said to be the subject of the larceny. Sorrells made no statement as to the ownership of the money though he did say it was in his pocketbook. It seems the pocketbook and money were both asportated or lost to him but there is no charge of larceny in the information with respect to the pocketbook. The sole charge relates to stealing ten dollars lawful money, the property of Sorrells. On the proof as made, the most favorable view which may be accorded in favor of sustaining the judgment is that by showing the pocketbook was Sorrells' property and the ten dollar bill was in it a presumptive ownership of the ten dollar bill is shown, for possession of the bill alone is prima facie evidence of its ownership. Such would be all sufficient in a civil case but this is not true in a criminal proceeding where the burden is on the state to prove every element of the offense charged beyond a reasonable doubt to the contrary. The ownership of the ten dollar bill and not the pocketbook is the question with which the court is concerned and such is an essential element to the offense of larceny, for it is the bill that is charged to have been stolen. Until the ownership is shown by something more than a mere presumption of law to the effect that possession is prima

facie evidence of ownership, the matter is repelled and overcome by the presumption of innocence which attends the accused at all times throughout the trial. A valid distinction obtains with respect to the force and effect of such presumptions invoked by the state in a criminal proceeding and those which may be invoked in civil actions. The Anglo-Saxon love of liberty culminates in the doctrine that all persons are presumed innocent of the offense charged until such presumption is overcome by showing a state of facts or circumstances which afford a legitimate inference to the contrary. As a rule, therefore, one may not be convicted upon a mere prima facie case being established through the medium of presumptions which are raised by the law, for one presumption of that character will not be allowed to overthrow or destroy the effect of another. [State v. Shelley, 166 Mo. 616, 618, 66 S. W. 430.] In this view, it has been heretofore ruled that though the evidence showed the subject of the larceny was taken out of the possession of a person who upon that showing was prima facie the owner, the proof of ownership was insufficient to overcome the presumption of innocence which obtains in defendant's favor until removed by a showing of facts or circumstances beyond a reasonable doubt to the contrary. [State v. James, 133 Mo. App. 300, 113 S. W. 232.]

Because of the insufficiency of the proof as to ownership of the bill, the judgment will be reversed and the cause remanded. It is so ordered. *Reynolds, P. J.*, and *Caulfield, J.*, concur.

MARY E. WILKERSON, Appellant, v. ANDREW J.
McGHEE, Respondent.

Springfield Court of Appeals, February 6, 1911.

1. **PLEADING: Malicious Prosecution: Want of Probable Cause.** In an action for damages for malicious prosecution a general averment of want of probable cause is ordinarily sufficient and it is not necessary to allege the facts which show or tend to show the want of probable cause.
2. **MALICIOUS PROSECUTION: Pleading: Notice: Obtaining Indictment Improperly.** In an action for damages for malicious prosecution it is not necessary to allege or show that the indictment was obtained by false or fraudulent testimony, but if it was obtained by any other improper means or if the evidence shows that the prosecutor, notwithstanding the action of the grand jury, did not himself believe that the defendant was guilty, but acted maliciously in making the charge, then he is liable.
3. ———: ———: ———: ———. If the defendant maliciously, and without probable cause, appeared before the grand jury and charged the plaintiff with a crime and caused witnesses to be subpoenaed and an indictment to be returned, it is not necessary for plaintiff to allege that the witnesses before the grand jury testified falsely.
4. ———: **Probable Cause.** Probable cause which would relieve the prosecutor from liability in an action for malicious prosecution is a belief by him in the guilt of the accused, based on circumstances sufficiently strong to induce such belief in the minds of reasonable and cautious men.
5. ———: ———: **Indictment Prima Facie Evidence of Probable Cause.** The action of the grand jury in finding an indictment is prima facie evidence of probable cause, but this may be overthrown in an action for damages for malicious prosecution by showing that the defendant acted maliciously in appearing before the grand jury and charging plaintiff with the crime when he did not believe and had no probable cause for believing such charge.

Appeal from Cape Girardeau Court of Common Pleas.
—Hon. Robert G. Ranney, Judge.

REVERSED AND REMANDED.

Oliver & Oliver for appellant.

(1) To put the criminal law in force, maliciously and without any reasonable or probable cause, is wrongful, and if thereby another is injured in property or person, there is that conjunction of injury and loss, which is the foundation of an action. *Pope v. Pollock*, 4 L. R. A. 25; *Addison on Torts*, 65; *Cooley on Torts*, 189. (2) The necessary allegations for, and gist of every action for malicious prosecution are the presence of malice and want of probable cause. This is so well established as to need no citations; but see the late cases of *Wehymeyer v. Mulvihill*, 130 S. W. 681; *Coleman v. Treece*, 130 S. W. 56. (3) The want of probable cause is a negative averment and should be so averred. The onus rests upon the plaintiff, however, to support such allegations at the trial by affirmative proof. *Wheeler v. Nesbit*, 65 U. S. 544; *Palmer v. Richardson*, 70 Ill. 544; 14 Am. and Eng. Ency. of Law, 63. (4) In pleading want of probable cause in malicious prosecution suits, it is only necessary to state that the prosecution was without reasonable or probable cause. *Walser v. Thier*, 56 Mo. 92; *Moody v. Deutsch*, 85 Mo. 242; *Ross v. Hixon*, 46 Kas. 550, 12 L. R. A. 760; *Given v. Webb*, 30 N. Y. 65; *Helbert v. Donaldson*, 69 Mo. App. 92; *Eagleton v. Kalrich & Longley*, 66 Mo. App. 231. (5) The established meaning of "probable cause" in this state is that it consists in a belief in the charge and facts alleged, based on sufficient circumstances to reasonably induce such belief in a person of ordinary prudence, in the same situation. *Boerger v. Langenberg*, 97 Mo. 396; *Lindsay v. Bates*, 223 Mo. 306, 122 S. W. 682. (6) It is generally held that a conviction in a trial court is conclusive of probable cause, but in a case such as the one at bar, where an indictment was quashed and prisoner discharged such a rule does not obtain; in such cases there is only prima facie probable cause and the same averments and proof are not required in

the petition for malicious prosecution as in the former case. In the latter case the plaintiff is only required to allege and prove; first, the institution by defendant of the former suit and its termination in his (present plaintiff's) favor; second, malice; third, want of probable cause; fourth, damage. When he has alleged these four things, he has alleged all that he needs to prove, and there can be no denial that this petition specifically alleges all four. McKensie v. Railroad, 24 Mo. App. 392; Kennedy v. Holliday, 25 Mo. App. 503; Stocking v. Howard, 73 Mo. 25; Best v. Hoffber, 39 Mo. App. 682; Leonard v. Transit Co., 115 Mo. App. 349; Graves v. Scott, 2 L. R. A. 935; Hays v. Blizzard, 30 Ind. 457; Lytton v. Baird, 95 Ind. 349; Castro v. De Uriarte, 12 Fed. 250; Jones v. Gwynn, 10 Mod. 214; Chambers v. Robinson, 1 Strange 691; Dennis v. Ryan, 65 N. Y. 385; Randol v. Henry, 5 Sten. and P. (Ala.) 367; Schatton v. Hollenback, 149 Ill. 652; Shaell v. Brown, 28 Iowa 37; Parli v. Reed, 30 Kas. 534; Morris v. Scott, 21 Wend. 281; Stone v. Stevens, 12 Conn. 219; Stancliff v. Palmeter, 18 Ind. 324; Cline v. Schuler, 30 N. C. 484; Vinal v. Cobe, 18 W. V. 1; Merriman v. Morgan, 7 Oregon 68; 14 Am. and Eng. Ency. Law (1 Ed.), 29; Bishop on Non-Contract Laws, secs. 248-9; Cooley on Torts (2 Ed.), 215. (7) A petition which contains matter showing a prima facie case of the existence of probable cause need not specifically state that the prosecution was obtained by fraud, perjury, falsehood or other unfair means. Stainer v. Mining Co., 166 Fed. 220; Ziegler v. Powell, 54 Ind. 173; Cramer v. Barmon, 136 Mo. App. 673; Ross v. Hixon, 12 L. R. A. 760.

T. D. Hines for respondent.

(1) Before verdict the rule is to construe a pleading most strongly against the pleader. Baxton v. Railroad, 98 Mo. App. 501; Badger Lbr. Co. v. Muehlbach, 109 Mo. App. 649. (2) But it is not necessary to call

into requisition the foregoing rule for our civil code imposes upon a plaintiff the duty of pleading in the petition, "a plain and concise statement of the facts constituting the cause of action." Even in justices' courts, however, the Supreme Court has held, that where the statement does not set forth the facts constituting the cause of action, nor does not advise the opposite party what he was sued for, the suit should be dismissed. *Sidway v. Land & Live Stock Co.*, 163 Mo. 373; *Brashears v. Strock*, 46 Mo. 321; *Davis v. Railroad*, 65 Mo. 441; *Swartz v. Nicholson*, 65 Mo. 508. (3) The precise nature of the charges must be made to appear in the petition, and not by the pleading of legal conclusions, but by pleading the constitutive facts. General averments will not suffice. The issuable facts must be plead. *McAdam v. Scudder*, 127 Mo. 345. (4) And it has been frequently ruled in a state from whence our code is derived, that such statement of a legal conclusion is not the averment of an issuable fact, and therefore is not confessed to be true by a demurrer, raises no issue and need not be denied. *Kittinger v. Traction Co.*, 54 N. E. 1084; 12 Ency. of Pl. and Pr., 1022; *McKenzie v. Mathews*, 59 Mo. 102; *Verdin v. St. Louis*, 131 Mo. 151; *Craft v. Thompson*, 51 N. H. 540; *Bliss on Code Pleading* (3 Ed.), sec. 413. (5) To support the action of malicious prosecution there must be affirmative proof of malice on the part of the prosecutor, and also want of probable cause. Neither one standing alone is sufficient. *Sharpe v. Johnson*, 59 Mo. 557, 76 Mo. 660; *Vansickle v. Brown*, 68 Mo. 627; *Frissell v. Rolfe*, 9 Mo. 859; *Sappington v. Wilson*, 50 Mo. 83. And if there be probable cause no malice however distinctly proved, will make the defendant liable. *Sharpe v. Johnson*, 59 Mo. 557; *Burris v. North*, 64 Mo. 436. (6) Probable cause has been defined as "belief founded upon reasonable grounds." The issue in such case is not whether the plaintiff was guilty of the crime charged in the criminal indictment, but whether defendant had probable

cause to believe him so, nevertheless the fact whether he was guilty or innocent is material as bearing on the question of probable cause. *Carp v. Insurance Co.*, 203 Mo. 345; *Brennan v. Tracey*, 2 Mo. App. 540. (7) The finding of an indictment against a party, or his commitment by an examining magistrate, is prima facie evidence of probable cause. *Sharpe v. Johnson*, 76 Mo. 660; *Firer v. Lowery*, 59 Mo. App. 92; *Vansickle v. Brown*, 68 Mo. 627; *Peck v. Chouteau*, 91 Mo. 138; *Stanley v. Turner*, 21 Mo. App. 244.

GRAY, J.—This is an action for malicious prosecution. The court sustained a demurrer to the petition, and the plaintiff appealed.

The cause is in this court on a transfer from the St. Louis Court of Appeals. The defendant insists that the cause be transferred to the St. Louis Court of Appeals, for the reason that this court is without jurisdiction, and the St. Louis Court of Appeals was without authority to transfer the cause here. In answering this contention, it is sufficient to say that the defendant appeared generally, in this court, and the question of jurisdiction was thereby waived.

The petition alleged in general words, that the defendant in the prosecution of plaintiff, acted maliciously and without probable cause. The defendant insists the petition does not state a cause of action, because it does not state the facts which show or tend to show the want of probable cause, and that the general statement that the prosecution was without probable cause is only a conclusion of law. A general averment of want of probable cause is ordinarily sufficient, and it is not necessary to allege the facts which prove or tend to prove the averment. [Ency. Pleading and Practice, vol. 13, page 439; *Hilbrandt v. Donaldson*, 69 Mo. App. 92; *Eagleton v. Kabrich et al.*, 66 Mo. App. 231; *Benson v. Bacon*, 99 Ind. 156; *Sutor v. Woods*, 76 Texas 403; *O'Neill v.*

Johnson, 53 Minn. 439; Stainer v. San Luis Valley Land & Mining Co., 166 Fed. 220.]

In Hilbrandt v. Donaldson, the court said: "The first error complained of in this court is that the petition does not state a cause of action. This point is not well taken. The petition alleges that the prosecution was malicious and without probable cause, and that it was ended. This constitutes a sufficient statement of a cause of action."

In Stainer v. San Luis Valley & Mining Co., supra, the Federal court said: "It seems to us that an allegation of want of probable cause is an allegation of an ultimate fact, a condensed expression which by practice and established usage, is made to signify that defendant did not have reasonable ground to believe that plaintiff was guilty. Accordingly, we conclude that a complaint, which by clear averment, charges that defendant maliciously and without any probable cause whatever, caused plaintiff to be prosecuted, states a good cause of action."

Respondent admits the general rule to be as above stated, but claims that the Supreme Court of this state, in Brown v. Cape Girardeau, 90 Mo. 380, 2 S. W. 302, has declared otherwise, and it is the duty of this court to follow the decision of the Supreme Court of this state. It is true language is found in the Brown case supporting respondent's contention, but the same is merely dictum and not a decision of the Supreme Court that we are required to follow. [Williams v. Railroad, 106 Mo. App. 61, 79 S. W. 1167.]

Our conclusion is that it is not necessary to allege the facts which prove or tend to prove want of probable cause, and that it is sufficient to allege, generally, that the prosecution was without probable cause.

It is next claimed the petition does not allege that plaintiff was innocent of the charge, or that any false testimony was given before the grand jury, or that the indictment was based on false testimony, and as the

petition shows an indictment was returned, it shows on its face a *prima facie* case of probable cause.

The petition does allege that the "defendant maliciously intending to injure the plaintiff in her good name and reputation, and without reasonable or probable cause therefor, appeared before the grand jury and did then and there make complaint of and charge this plaintiff with having committed a misdemeanor. And that the defendant was instrumental in instigating, instituting, pressing and continuing this charge against her before said grand jury, and that he maliciously, wantonly and without probable or reasonable cause therefor, produced and furnished the names of witnesses that came before the grand jury, and that it was upon the testimony so furnished and produced by him that the indictment was returned."

Probable cause which will relieve a prosecutor from liability, is a belief by him in the guilt of the accused, based on circumstances sufficiently strong to induce such belief in the mind of a reasonable and cautious man. [Van Sickle v. Brown, 68 Mo. 627.] If the defendant maliciously and without probable cause, appeared before the grand jury and charged the plaintiff with a crime, and caused witnesses to be subpoenaed and an indictment to be returned, it was not necessary for plaintiff to allege that the witnesses before the grand jury testified falsely. [Sharpe v. Johnson, 76 Mo. 660; Staley v. Turner, 21 Mo. App. 244; Firer v. Lowery, 59 Mo. App. 92.]

The respondent claims the action of the grand jury in finding a bill of indictment, was *prima facie* evidence of probable cause, and the petition contained no allegation destroying the *prima facie* case of probable cause shown by the petition. It is true the action of a grand jury in finding an indictment, is *prima facie* evidence of probable cause. [Sharpe v. Johnson, *supra*.] But it is only a *prima facie* case, and a defendant may still be liable although an indictment was returned and the

same was quashed without a trial on the merits. If the defendant acted maliciously and without any probable cause appeared before the grand jury and charged that the plaintiff was guilty of a misdemeanor when he knew at the time there was no probable cause for such charge, then the fact that the grand jury returned an indictment without witnesses testifying falsely to procure the same, will not relieve the defendant of responsibility.

In *Sharpe v. Johnson*, the court said: "When an indictment has been found by the grand jury or the defendant has been committed by the examining magistrate, this *prima facie* evidence of probable cause may be rebutted or overthrown by evidence showing that such indictment, or commitment, was obtained by false or fraudulent testimony, or other improper means, or by evidence showing that the prosecutor, notwithstanding the action of the grand jury, or the committing magistrate, did not himself believe the defendant to be guilty."

In that case the Supreme Court declares the rule that it is not necessary that the indictment was obtained by false or fraudulent testimony, but if it was obtained by any other improper means, or if the evidence shows that the prosecutor, notwithstanding the action of the grand jury, did not himself believe the defendant to be guilty, but acted maliciously in making the charge, then he is liable.

The petition in this case charged in general language that the defendant maliciously intending to injure the plaintiff, and without any probable cause, appeared before the grand jury and charged that the plaintiff had committed a misdemeanor, and gave to the grand jury the names of the witnesses to be summoned before it in order that an indictment against plaintiff might be returned. If in so doing he acted maliciously and without any probable cause, he is liable to the plaintiff for damages she sustained.

We are of the opinion that the court erred in sustaining the demurrer to the petition, and on account thereof the judgment must be reversed and the cause remanded, and it is so ordered. All concur.

AUGUSTA BRINKMAN, Respondent, v. F. W.
GOTTENSTROETER, Appellant.

Springfield Court of Appeals, February 6, 1911.

1. **DEATH BY WRONGFUL ACT: Self-Defense: Question for Jury.** Where defendant is sued for damages for killing plaintiff's husband who admits the killing and justifies on the ground of self-defense; whether his evidence is sufficient to sustain his plea of justification is a question for the jury.
2. ———: **Damages: Surviving Children.** In a suit for damages for killing plaintiff's husband the jury, in determining the amount of damages, had the right to take into consideration the evidence that deceased had left minor children for the plaintiff to support.
3. **PRACTICE: Remarks of Court: Ruling on Evidence.** The trial court ruled as incompetent the testimony of a witness, but later in the trial changed its ruling and permitted the witness to testify. The remarks of the trial court in the presence of the jury in regard to changing its ruling are examined and held not improper.
4. ———: **Remarks of Counsel: Objections.** If the argument of counsel is proper as to a particular issue in a case and improper as to others, then the opposing parties should ask the court to limit the effect of the argument to the proper issue and a general objection will not do.
5. **INSTRUCTIONS: Must be Based on Evidence.** In a suit for damages for killing plaintiff's husband, it appeared that defendant was an officer, but there was no evidence that at the time of the killing he was acting or pretending to act in his official capacity. *Held*, that it was not error for the court to ignore in its instructions the fact that defendant was an officer, and his rights in the premises as such.

Appeal from Franklin Circuit Court.—*Hon. R. S. Ryors*, Judge.

AFFIRMED.

Jesse H. Schaper and John W. Booth for appellant.

(1) There was no substantial evidence in the case sufficient to authorize the jury to find a verdict for the plaintiff; therefore the court erred in giving to the jury each of the instructions given at the instance of the plaintiff. *Holden v. Railroad*, 177 Mo. 469; R. S. 1899, sec. 6013; *State v. Coleman*, 185 Mo. 151; *State v. McNally*, 87 Mo. 644. (2) The rule is firmly established in Missouri that instructions purporting to cover the whole case, must be "so framed as to meet the points raised by the evidence and pleadings on both sides." That is to say, must meet all the issues made in the pleadings and supported by substantial evidence. *Clark v. Hammerle*, 27 Mo. 70; *Fitzgerald v. Hayward et al.*, 50 Mo. 523; *Goetz v. Railroad*, 50 Mo. 474; *Land & Lumber Co. v. Tie Co.*, 87 Mo. App. 176; *Boden v. Falk Co.*, 97 Mo. App. 566; *Austin v. Transit Co.*, 115 Mo. App. 152; *Phelan v. Paving Co.*, 115 Mo. App. 436; *Toncrey v. Railroad*, 129 Mo. App. 600. (3) What reasonable doubt can there be but that the appeal for sympathy was effective to win the jury, and cause them to give plaintiff the benefit of every doubt in determining the issues in the cause? The verdict should therefore be set aside. *Harper v. Telegraph Co.*, 92 Mo. App. 304; *Mahner v. Linck*, 70 Mo. App. 380.

J. C. Kiskaddon, R. L. Shackelford and A. H. Kiskaddon for respondent.

(1) The first contention of the defendant is that, "The protection which an officer is entitled to receive is a different thing from self-defense, but that, in making an arrest, his duty is to overcome all resistance, and the means he may use may be co-extensive with his duty, even to the killing of the wrongdoer." The plaintiff

contends that the above is an incorrect statement of the law. In support of this position we wish to call the attention of the court to the following authorities. Kelly's Criminal Law, secs. 73 and 491; State v. McNally, 87 Mo. 659; State v. Anderson, 1 Hill (N. Y.) 327; 9 Am. and Eng. Ency. Law (1 Ed.), 608; 1 Bishop, Crim. Prac., sec. 617; 1 Russ. Cr. (7 Am. Ed.), 641; Forster's Case, 1 Lewin (Eng.) 187. Under one certain and particular condition, and under that only, may an officer, in making an arrest for a misdemeanor, kill the offender. That certain and particular condition arises when the offender so assaults the officer that, as a reasonable man, he must conclude he is in danger of death or great bodily injury. (2) The courts of this state hold that a plaintiff, suing under this act, (R. S. 1909, secs. 5426, 5427) to recover for the death of her husband, was properly allowed to state the number and ages of her minor children, to show the burden which their father's death had placed upon her. Organ v. Railroad, 142 Mo. App. 248; Tetherow v. Railroad, 98 Mo. 74; Soeder v. Railroad, 100 Mo. 673; O'Melia v. Railroad, 115 Mo. 205; Haehl v. Railroad, 119 Mo. 325; Schlereth v. Railroad, 115 Mo. 88.

GRAY, J.—This is an action by the widow of August F. Brinkman, against the defendant, to recover damages for the death of her husband. The petition alleged that the defendant, on the 9th day of March, 1908, unlawfully and wrongfully shot and killed the plaintiff's husband, to her damage in the sum of ten thousand dollars.

The answer admitted defendant shot and killed the deceased, but alleged affirmatively, that the act was done in self-defense.

The cause was tried during the July term, 1908, of the circuit court of said county, and the jury returned a verdict in favor of plaintiff in the sum of

\$5400. The defendant appealed to the Supreme Court, and that court transferred the cause to the St. Louis Court of Appeals, and the St. Louis Court transferred the cause to this court. Both parties have appeared in this court, and no question of jurisdiction is involved.

The defendant contends that the verdict is not sustained by any substantial evidence. He admitted that he killed plaintiff's husband and justified on the ground of self-defense. Whether his evidence was sufficient to sustain his plea of justification, was for the jury. [Morgan v. Mulhall, 214 Mo. l. c. 459, 114 S. W. 4; Pierce Loan Co. v. Killian, 132 S. W. 280; Orscheln v. Scott, 90 Mo. App. 353; State v. Evans, 124 Mo. 397, 28 S. W. 8; Seehorn v. Bank, 148 Mo. 256, 49 S. W. 886.]

One Edw. Kunelmeyer gave important testimony in behalf of plaintiff. The defense offered several witnesses to prove that Kunelmeyer's general reputation for truth and veracity was bad. This list included one Dr. Fitzgerald, who testified that his knowledge of the reputation of Kunelmeyer had been obtained since the death of plaintiff's husband. Whereupon, the court refused to permit him to testify to the witness' reputation. Later in the trial, the court changed its ruling and permitted the witness to testify. In changing its ruling, the court said, in the presence of the jury: "Having studied over this matter, I find it necessary to change my ruling. Applying the rule where a witness has testified that reputation is bad, and upon cross-examination it discloses the fact that he has formed the opinion and it has become permanent, I think it is something for the jury to determine and is not rendered inadmissible. The court thinks such evidence is admissible, and the manner in which he acquired his knowledge is a question to be determined by the jury."

We fail to see anything improper in the remarks of the court. The court had erred in rejecting the testimony when it was first offered, and in correcting its

error, it simply stated that the testimony was competent and the weight of it was for the jury.

In his argument before the jury, counsel for plaintiff said: "The jury has a right in determining the issues in this case, to take into consideration the fact that plaintiff is the mother of five little minor children; and the age and condition of each of said minor children." Counsel for the defendant objected to the remarks, and the court overruled his objection. It is now claimed the remarks were improper and prejudicial. In determining the amount of the damages, the jury had the right to take into consideration the evidence that deceased had left minor children for the plaintiff to support. [Fisher v. Central Lead Co., 156 Mo. 479, 56 S. W. 1107; Tethrow v. Railroad Co., 98 Mo. 74, 11 S. W. 310.]

The defendant admits the argument was proper if limited to the question of damages, but says it was not so limited, and that plaintiff's counsel intended thereby to procure the sympathy of the jury, and thus get a finding in his client's favor on the main issue. It seems to us the rule governing such matters should be the same as the one relating to the introduction of testimony. If testimony is admissible for any purpose, a general objection to it as improper, is not sufficient. The party should ask to have the testimony limited to its proper purpose. And if an argument is proper as to a particular issue in the case, and improper as to the others, then the opposing party should ask the court to limit the effect of the argument to the proper issue, and a general objection will not do.

In this case, no such request was made, and the trial court did not see fit to sustain the objection or to grant a new trial on account of any improper conduct of plaintiff's counsel. Such questions must largely be left to the sound discretion of the trial court, and it is only when an abuse of such discretion is shown, that the appellate courts are justified in interfering.

The appellant contends that the court's instructions ignore the fact that defendant was an officer and his rights in the premises as such. There was no evidence that the defendant was acting in his official capacity, or that he pretended to act as such at the time.

We have disposed of all the errors assigned, and having determined them in favor of the respondent, the judgment of the circuit court should be affirmed, and the same is accordingly done. All concur.

THOMAS S. HEATH, Respondent, v. B. F. TUCKER,
Appellant.

Springfield Court of Appeals, February 6, 1911.

1. **CONTRACTS: Assignments: Trusts and Trustees: Undue Influence: Setting Aside Transfer of Property.** Plaintiff, a store-keeper, became heavily in debt and much worried over his business, and at his request defendant took over his store as assignee for the benefit of the creditors, and later defendant purchased from plaintiff his equity in the stock of goods. Plaintiff subsequently sued to set aside the alleged assignment for the benefit of the creditors and the transfer of his equity to defendant, on the grounds that the transactions were made at a time when he was not responsible mentally and that he had been unduly influenced by defendant, who occupied a fiduciary position. The evidence is examined *held* not sufficient to support the charge of fraud or undue influence, or to warrant the setting aside of the transfers made by plaintiff.
2. **TRUSTS AND TRUSTEES: Duty of Trustee: Transaction Between Trustee and Beneficiary.** A transaction between the trustee and *cestui que trust* is always scrutinized in a court of equity with a watchful eye, and will not be sustained to the disadvantage of the *cestui que trust*, except upon the most complete and satisfactory evidence of good faith and fair dealing on the part of the trustee.
3. ———: ———: ———. While the law exacts of a trustee the utmost good faith in all his dealings with the beneficiary regarding a trust fund, it has never been announced that such dealings are void and are to be held for naught at the instance of the beneficiary by the mere suggestion of the relationship.

Heath v. Tucker.

4. ———: ———: ———: **Burden of Proof.** There is no difference in the treatment of dealings between trustee and *cestui que trust*, than between strangers, except in the manner and burden of proof. When the dealing is assailed in a proper proceeding, charging the trustee with unfairness or fraud, the burden is upon the trustee to show that the transaction was open, fair, honest and free from fraud on his part; while, in all other cases, he who alleges and charges unfairness or fraud must prove it.
5. ———: ———: ———: **Termination of Relationship: Offer to Rescind.** It appeared from the evidence that during the relationship of trustee and *cestui que trust* existing between plaintiff and defendant, the defendant purchased from plaintiff his equity in the trust property, but that later when no such fiduciary relation existed and plaintiff complained of the transaction, the trustee offered to trade back, which proposition the plaintiff refused. Later the rights of third parties intervened and it was impossible to put the plaintiff in *statu quo*. *Held*, in a subsequent action to rescind, or to require defendant to account and pay more for the property, that plaintiff could not recover.
6. ———: ———: ———: **Equity: Litigant Must Come With Clean Hands.** A litigant coming into a court of equity must come with clean hands, and so where a beneficiary sues to rescind a contract made with his trustee, when he knows that it is impossible to restore things to the situation they were in at the time the contract was made, and it also appears that the trustee had offered to rescind prior to the institution of the suit, at which time the parties could have been placed in *statu quo*; *held*, that it would not be fair or equitable to permit plaintiff to sustain such action.
7. **EQUITY: Action to Rescind Contract: Plaintiff Must Show Diligence.** When one comes into a court of equity to rescind a contract on the grounds of fraud he must be able to show as a primary condition to his right to rescind, that he has been prompt and diligent in disavowing the obligation into which he alleges he was fraudulently led.

Appeal from Hickory Circuit Court.—*Hon. C. H. Skinker*, Judge.

REVERSED.

J. W. Montgomery and Rechow & Pufahl for appellant.

(1) The final settlement is conclusive of all matters embraced therein. *May v. May*, 189 Mo. 485; *State ex rel. v. Carroll*, 101 Mo. App. 110; *Coulter v. Lyda*, 102 Mo. App. 401; *Park v. Jamison*, 82 Mo. 552. (2) In any event the allowances were at least *prima facie* correct, and as they were not in the suit at bar attacked or shown to be unreasonable, should have been allowed. *Ansley v. Richardson*, 95 Mo. App. 332; *State ex rel. v. Strickland*, 80 Mo. App. 401; *Clark v. Sinks*, 144 Mo. 448; *In re Meeker*, 45 Mo. App. 186; *Jacobs v. Jacobs*, 99 Mo. 427. (3) A trustee may purchase from his *cestui que trust*. *Sallee v. Chandler*, 26 Mo. 124; *Richards v. Pitts*, 124 Mo. 602; *State ex rel. v. Jones*, 131 Mo. 210; *Buford v. Aldredge*, 165 Mo. 426; *Kerr on Fraud and Mistake* (1 Am. Ed.), 156; *Evans v. Evans*, 196 Mo. 1. (4) On an accounting where the trustee acted in good faith, he will be allowed for his services and responsibilities. *Scudder v. Ames*, 142 Mo. 232; *Albert v. Sanford*, 201 Mo. 117.

W. S. Jackson, Henry P. Lay and *W. A. Dollarhide* for respondent.

(1) A trustee who is guilty of fraud or misconduct is not entitled to compensation for his services or his expenses. 3 Amer. and Eng. Ency. Law (2 Ed.), 117; *In re Hyman*, 14 Daly (N. Y.) 375; *Burrill on Assignments* (4 Ed.), sec. 425; *Newton v. Rebeneck*, 90 Mo. App. 650. (2) Tucker was not entitled to recover his expenses in the former litigation of the matters involved in this case. *Heath v. Tucker*, 117 S. W. 125. *Burrill on Assignments* (4 Ed.), 634. (3) While it is true that under certain conditions a trustee may purchase the trust property from his *cestui que trust*, yet he does so at his peril, and the burden is upon him to

show to the satisfaction of the court that the utmost fairness governed the transaction. *Evans v. Evans*, 196 Mo. 1; *Ryan v. Ryan*, 174 Mo. 279; *Barrett v. Ball*, 101 Mo. App. 288; 28 Am. and Eng. Ency. Law (2 Ed.), 1020.

GRAY, J.—The plaintiff, on the 26th day of February, 1907, was, and for a long time prior thereto, had been engaged in the general merchandise business at the town of Weaubleau, in Hickory county, this state. He had become worried about his business affairs, and on said day conveyed his property to the defendant herein as assignee for the benefit of creditors. The property consisted largely of merchandise, and amounted to about \$14,000, as shown by an inventory taken by the defendant as assignee, and was appraised at the value of \$9-629.96, a sum largely in excess of the plaintiff's debts. After making the assignment, he formed the resolution of selling his equity in the property, and approached the defendant with the view of selling the same to him. After the plaintiff had made several propositions, they finally entered into an agreement, by the terms of which the defendant agreed to pay plaintiff for his equity, \$2-200, which agreement was carried out by defendant paying \$500 in cash and executing his note for \$1700 for the balance, and plaintiff conveyed his equity to him. After this transaction, the defendant continued in charge of the estate as assignee under the deed of assignment from plaintiff to him, and made his final settlement with the court under the statute, as though he had not purchased the plaintiff's equity.

Shortly after the purchase of the equity, the defendant transferred one-third of the stock to one George W. Lindsey, and one-third to a Mr. Whitaker. The transfer was made by each of the parties paying to the defendant one-third of the \$500 cash payment he had made to plaintiff, and by assuming and subsequently

paying one-third of the \$1700 note defendant had given to plaintiff for the purchase of his equity.

When the defendant made his settlement, the plaintiff appeared and filed exceptions thereto, on the theory that the transfer of his equity to the defendant was void. The circuit court sustained the exceptions, and defendant appealed to the Kansas City Court of Appeals. The opinion of the Court of Appeals in the case will be found in 136 Mo. App. 347, 117 S. W. 125. The court reversed the judgment on the ground that the circuit court was without jurisdiction in the assignment proceedings to set aside the transfer of the equity. The court held the proceedings in the assignment matter were purely statutory and not equitable, and that on exceptions to the final report of the assignee only such matters as pertained to the administration of the estate in his hands were matters for investigation. The court reversed and remanded the cause with directions to the assignee to make final settlement in accordance with the views expressed in the opinion. The court further held that the validity of the transfer could only be attacked for fraud in its procurement in a proceeding in a court of equity.

After the cause had been remanded, the defendant made his final settlement in the circuit court. In that settlement he was charged with the sum of \$10021.31. The value of the assets which came to his hands by virtue of the assignment was \$9629.95. The assignee had purchased claims of certain creditors at a discount of \$391.36, which added to the value of the assets, made the said sum of \$10021.31. The assignee was allowed the following credits: \$133.74 expenses of taking inventory and appraising the stock; the sum of \$500 allowed to the assignee for services in making his bond and for attorney's fees up to and including the time of the purchase of the equity; the sum of \$5249.80 on account of sums paid to creditors; the sum of \$59.21 on account of certain due bills; the sum of \$2200 being the amount

paid the plaintiff for his equity; the sum of \$700 for attorney's fees and expenses in defending in the circuit court and on appeal against the exceptions filed by the plaintiff, and other small amounts aggregating \$11.40, and leaving the amount due of \$1167.16.

In the May term, 1909, of the circuit court of Hickory county, the present proceeding was instituted to set aside the transfer by plaintiff to the defendant of his equity in the assigned estate. The petition alleged that on the 26th day of February, 1907, the plaintiff was the owner of certain real estate and a stock of general merchandise and store fixtures in Weaubleau, then of the reasonable cash market value of \$14500; that at said date and for sometime prior thereto, the plaintiff was engaged in business as a general merchant in said city, doing business under the style of T. S. Heath and Son, his son being only a nominal partner and having no actual interest in the business, and in conducting said business, the plaintiff had become indebted to creditors in the sum of \$5162.40; that for a considerable time prior to said date, the plaintiff's health had been poor by reason of which, and of his business affairs, his mind became greatly perturbed and distressed, and he was wholly incapable of intelligently managing his affairs; that although he was wholly solvent and his business in a flourishing condition and very valuable, the plaintiff became possessed of the insane delusion that he was about to fail in business, and as a result thereof, he was likely to be imprisoned, etc; that realizing his impaired mental condition, and feeling the need of advice and assistance, he went to the defendant, who was a man of property, business ability and experience, and told him the situation of his affairs, and requested the defendant's advice and assistance, and in so doing relied upon the warm and confidential friendship which he believed existed between him and the defendant; that plaintiff desired and requested the defendant to become his agent and trustee for the purpose of taking charge of the busi-

ness and of managing the same until plaintiff had recovered his usual health of body and mind.

The petition further alleged that the defendant consented to take charge of said business, but after consulting his attorney, advised the plaintiff to make an assignment to him of all of his property, although there was nothing in the condition of plaintiff's affairs which justified such action, yet by reason of plaintiff's distressed condition of mind and his confidence in the defendant, he consented to and did make the assignment to the defendant; that the defendant at once took charge and possession of the property and of the business, and proceeded to make an inventory which he completed on or about the 12th day of March, 1907, and found from said inventory the reasonable value of the property covered by said assignment was \$14566.51, and that the liabilities of the plaintiff amounted to \$5162.40, and that the net value of the property was \$9404.11; that "the defendant desiring and intending to make an unlawful and unconscionable profit for himself and wholly disregarding his duties as trustee and as imposed by the confidential relationship between himself and the plaintiff and seeking to take advantage of the derangement of plaintiff's mind, the defendant entered into negotiations with the plaintiff for the purchase of plaintiff's 'equity' in the assigned estate. That at the time the plaintiff was temporarily insane and was wholly unable to deal with the defendant upon an equal footing, and had an entirely erroneous idea of the value of his property, all of which was known to the defendant and of which he sought to take advantage.

"That as the result of said negotiations and of fraudulent misrepresentations made by the defendant to the plaintiff as to the value of said property and of the condition of said business, and of the confidential relations existing between the plaintiff and defendant, the plaintiff was induced by the defendant to execute an instrument purporting to be a transfer and assign-

ment of all of plaintiff's 'equity' in the property aforesaid.

"That by reason of said false representations made by the defendant to the plaintiff, the mental condition of the plaintiff, the position of trust occupied by the defendant, and the confidential relationship between the plaintiff and defendant, the said instrument and pretended transfer is, and should be held void and should be set aside.

"Wherefore plaintiff prays that the said assignment and also the said pretended transfer of plaintiff's 'equity' in said property be set aside and for naught held; but it appearing from the premises that the rights of third parties have intervened, and that by reason of the manner in which the defendant has conducted said business, it will now be impossible to place the parties in *statu quo* by ordering the return of said property, it is therefore further prayed that the title to said property be vested in the defendant; that he be required to account for the value thereof," etc.

The defendant answered admitting the making of the deed of assignment, the transfer of the equity, the incurring of the expenses and making the payments set out in the previous part of this statement, and as shown by his settlement as assignee. The defendant further alleged that if the stock of merchandise had been sold at assignee's sale in due course of administration, the same would not have brought fifty per cent of the invoiced price. He further denied that the plaintiff was not able to take care of himself when the assignment and transfer of the equity were made, or that he took any advantage of the plaintiff, and expressly alleged that the plaintiff well knew at the time of the transfer of the equity, the appraised value of the property, as well as the inventory value and the amount of the indebtedness against the same; that about the time the inventory was completed, the plaintiff commenced importuning the defendant to buy his equity in the assigned property;

that for sometime the defendant refused to deal with the plaintiff, and continued to refuse to buy his equity until after the completion of the inventory and appraisal, and not until the plaintiff was well aware of the value of the property and the indebtedness against the same.

The trial court did not find that the plaintiff at the time the assignment was made was unable to take care of or manage his business affairs, but did find that at the time the equity was transferred, the mind of the plaintiff was in a greatly perturbed condition by reason of which and of the fiduciary relation existing between the parties, plaintiff was unable to deal with the defendant on fair and equal basis, and for that reason the transfer of the equity to defendant should be set aside. The court charged the defendant with the same amount he was charged with in his final settlement as assignee; and held he was entitled to credit for sums paid to plaintiff, and to others for plaintiff's benefit, aggregating \$8054.15, leaving a balance of \$1967.16, for which the defendant should account to the plaintiff, and rendered judgment against defendant therefor. From that judgment the defendant appealed to this court.

There are several charges in the plaintiff's petition wholly unsupported by the evidence. The plaintiff's business was not in a flourishing condition. He owed about \$5000 then due, and the assignment was made at the very dullest season of the year. Realizing the situation the plaintiff had been for some time trying to induce others to go in with him and form a corporation to handle his business. He had sometime prior to the making of the assignment, made a trip to Oklahoma with the view of changing his location and quitting the mercantile business in Missouri. About two months previous to the assignment, he had transferred and delivered to his son-in-law, clothing out of the stock amounting to about \$1500 for which the son-in-law gave notes payable to the plaintiff's wife. It is not

claimed in the testimony that the clothing was the property of the wife or that the notes were given to her for any indebtedness of the husband, and the same were not included in the assignment. Some time previous to February 26, 1907, a new store had opened across the street from plaintiff's, and there is testimony tending to prove that a share of the previous business of the plaintiff was being done by the new competitor.

There is no testimony in the case to support the allegation of the petition that the defendant induced or requested the plaintiff to make the assignment or that the plaintiff had any special confidence in the defendant. Prior to the making of the assignment and prior to the time he first met or talked with the defendant about the same, he had consulted with others in regard to the matter, and with the view of having some one take charge of his business and pay his debts. He approached defendant and requested him to become his agent for that purpose. The defendant did not consent to do so at first, but finally agreed to do so if matters could be fixed legally. The plaintiff and the defendant then went to the county seat and the plaintiff employed Mr. Montgomery, an attorney at law, and consulted him in and out of the presence of the defendant relating to his financial condition. As a result of the interview between the parties hereto and the attorney, the attorney advised an assignment and prepared the conveyance therefor.

At the time the assignment was made, the plaintiff was in consultation with his son-in-law and his said son, and they both admit in their testimony that they advised him to make the assignment.

There is no testimony in the case that the defendant in any wise requested or induced the plaintiff to sell him his equity in the stock. The only evidence as to the matter comes from the defendant and his witnesses. They agree that the plaintiff shortly after the deed of assignment had been made, was anxious to sell his equi-

ty, and offered the same to the defendant for the sum of \$500; that the defendant refused to buy it and advised him it was worth more; that he then offered to take \$1000 and the defendant refused to buy at that price. Finally he offered his equity for \$2000 and the defendant agreed to take the same at that price, and prepared a contract by the terms of which the defendant agreed to pay \$2000 for the equity, and to assume certain debts amounting to about \$4500 and supposed to be all the debts owed by the plaintiff.

The plaintiff did not accept the instrument as prepared by the defendant, but wrote another himself, by the terms of which the defendant was to pay him \$2200 for his equity and to assume and pay all the debts of whatsoever kind of Heath and Son, or of the plaintiff individually.

After the parties had verbally agreed to the purchase of the equity at \$2000 and the payment of all debts, the plaintiff learned the defendant had made arrangements for discounts from certain of the creditors, and thereupon he demanded that defendant pay him the additional sum of \$200 as his proper part of such discount. In addition to the \$2200 the defendant also agreed to buy a stove for the plaintiff's wife, not to exceed the sum of \$50.

The evidence further shows that after the assignment had been made, and while the inventory was being taken, representatives of certain creditors called to look after their accounts, and in the presence of the plaintiff stated that the plaintiff's assets were largely in excess of his liabilities, and that he was not in such bad shape financially.

The evidence further shows that some time after the purchase of the equity by the defendant, the plaintiff became dissatisfied and called to see the defendant, and the persons who had purchased an interest with him, relating to the transfer, and requested that the defendant pay premiums which would come due in the future,

on life insurance policies carried by the plaintiff. The defendant and his associates refused to make any further payment, and thereupon notified the plaintiff that if he was dissatisfied with the transfer of his equity, that he could have the property turned back to him if he would redeliver to the defendant the note defendant had made him, and repay the \$500 he had received. The plaintiff refused to do so, and said he did not want the property back.

There is no testimony in the case supporting the charge of false representations made by the defendant to the plaintiff to induce him to make the assignment or to execute the instrument transferring his equity. No testimony was offered tending to prove that defendant at any time made any undue statement or false representation to the plaintiff, and if the transfer is to be set aside, it must be on the ground that plaintiff's mind was in such condition that he was unable to contract, considered with the fact that a fiduciary relation existed between him and the defendant.

The evidence offered by plaintiff tends to prove that about the time of the execution of the deed of assignment, the plaintiff became much worried about his financial matters. He had been a merchant for many years, and had enjoyed the reputation of being one of the good and substantial citizens of his community. Suddenly he found himself confronted with an indebtedness of over \$5000 then due, and no money to meet it. He also realized that his only way to get money to pay his debts was from the sale of his goods; and that such sales must be made in the very dullest season of the year. He had transferred to his son-in-law a part of his stock of goods and the notes in payment therefor had been executed to and delivered to his wife. His situation greatly wounded his pride and worried him until he had become nervous and changed in his usual habits and appearance. He was in poor health and realized that he was well in the afternoon of life, and

perhaps would be unable to remove the financial clouds hanging over him. He was not insane, and no advantage was taken of him by the defendant in procuring the assignment of the equity in the estate.

There is nothing in the record to justify a court in holding the original deed or assignment invalid. And if the assignment of the equity is held invalid, it must be solely upon the ground that the condition of the health and mind of plaintiff at the time it was made, was such as to invalidate the transaction when scrutinized by the very suspicious view which courts take of transactions between trustee and *cestui que trust*. It is the language of all the authorities that such a transaction is always scrutinized in a court of equity with a watchful eye, and will not be sustained to the disadvantage of the *cestui que trust*, except upon the most complete and satisfactory evidence of good faith and fair dealing on the part of the trustee.

In passing on the issues, we are not to deal with evidence showing any intentional wrong on the part of the trustee, or of any failure on his part to fully disclose to the beneficiary all information he had relating to the trust estate. There was no intentional concealment, no misrepresentation, no actual fraud. The issues to be determined arise from the very conception and existence of a fiduciary relation. It may also be observed that the issues in this case are not to be confused by the law relating to dealings by the trustee wherein he, as trustee, conveyed the property to himself.

"While the law exacts of a trustee the utmost good faith in all his dealings with the beneficiary regarding the trust funds in his hands, and commands him, on account of the fiduciary relation, to make full, fair, and open disclosures of all facts in his possession, it has never yet been announced that all dealings in regard to the trust fund are void and to be held for naught, in a court of law, at the mere suggestion of the relationship of the parties by the beneficiary. The office of

trustee is no mere pitfall into which any scheming, exacting, or traitorous beneficiary may throw the trustee at pleasure. There is no difference in the treatment of dealings between trustee and the *cestui que trust*, or the fiduciary with his beneficiary, than with strangers, except in the manner and burden of proof when the dealing is assailed in a proper proceeding charging to the trustee or fiduciary unfairness or fraud. Under these circumstances, the burden is upon the trustee or fiduciary to show that the transaction was open, fair, honest, and free from fraud on his part, whereas in all other cases he who alleges and charges unfairness or fraud must prove it." [State ex rel. v. Jones, 131 Mo. l. c. 210, 33 S. W. 23.]

In *Sallee v. Chandler*, 26 Mo. l. c. 129, SCOTT, Judge, speaking for the Supreme Court of this state, said: "However, a purchase by the trustee from his *cestui que trust* is at all times a transaction of great nicety, and one which the courts will watch with the utmost diligence. A trustee may purchase from the *cestui que trust*, provided there is a distinct and clear contract, ascertained to be such after a jealous and scrupulous examination of all the circumstances, that the *cestui que trust* intended the trustee should buy, and there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee. It will rest with the trustee to establish in evidence that there was such a bona fide contract between them, as according to the rule just referred to, will sustain the purchase in a court of equity. The court, if satisfied as to this evidence, will support the transaction; but if any unfair advantage has been taken by the trustee by withholding information or other fraudulent dealing, the purchase will at once be set aside; and mere inadequacy of price will go a great way in the mind of the court to constitute such fraud, though

the purchase will not necessarily be set aside on that account alone."

This court has always given full credit to the finding of facts of the trial court in equity cases. In this case, however there is but little dispute between the witnesses as to the material facts in the case. The fact that plaintiff was greatly worried over his financial situation, and to the extent that his health had become impaired, and he was very nervous and could not sleep, has been determined by two trial courts. And it is only from the fact that this issue has been found in favor of the plaintiff by two trial courts, that we refuse to make a contrary finding. The plaintiff was dissatisfied with the terms of the agreement that defendant had prepared to evidence the transfer of the equity, and prepared one himself, which is contained in the pleadings in this case, and an examination thereof will show that it was prepared by a man able to take care of himself. In addition to the business intelligence disclosed in the preparation of this instrument, the plaintiff, when he learned that defendant had contracted for certain discounts on debts due merchants, demanded and required defendant to pay him an additional price for his equity on account thereof. He even found fault with the rate of interest he was to receive from defendant on the deferred payments, and demanded the highest rate of interest allowed by the laws of this state. When he executed the assignment paper, the inventory was about completed, and he knew as well as the defendant, the inventory value of his estate. He was surrounded by his son, who was his partner in the business, and by his son-in-law, who had also been connected with the stock of goods and had a general knowledge of the value thereof. His health was poor and he was willing, perhaps, to take less than the actual value of the property in order to get away from the embarrassing surroundings and from the worry of his unfortunate financial condition. He turned to the defendant and urged him

to buy the stock, which the defendant first refused to do. The plaintiff was also advised by the representatives of the wholesale houses to whom he was indebted, that his stock was largely in excess of the payment of his debts.

The plaintiff has never testified in any of the courts relating to the transaction. And there is no showing that his testimony could not have been procured. He has refused, at all times, to advance any money to pay the expenses of the litigation with the trustee, but has required of his attorneys the payment thereof. Two trial judges, however, have held that his condition was such, that regardless of any improper conduct on the part of the trustee, the transfer should be set aside, and while we have some doubt in the matter, we do not feel justified in overruling the trial courts thereon, unless the subsequent conduct of plaintiff requires such action.

The defendant in his answer, alleged that after the relation had ceased and the plaintiff was acquainted with all the facts and circumstances, and while defendant was in possession and control of all of the assigned estate, the plaintiff expressed his dissatisfaction with the transfer and demanded some additional consideration therefor, but defendant refused to pay the additional consideration, and notified plaintiff that he could have his option to return the \$500 in cash he had received and redeliver the note he had received for the transfer of his equity, and all the property would be returned to him. But plaintiff, with such knowledge, refused to repay the money or deliver the note, but kept and retained the same and collected the note and the interest thereon.

The allegation of the answer is sustained by the uncontradicted testimony in the case. The evidence shows not only that the defendant made the offer above set forth under the above conditions, but also that plaintiff afterwards went to the person to whom defendant

had transferred one-third of the property, who made the same offer, and it was rejected by plaintiff. When such offers were made there was no fiduciary relation existing between the plaintiff and the defendant. The plaintiff then had full knowledge of every detail of the situation and acted independently of any confidential relation, and was dealing with the defendant and his associate as strangers.

While it is true where relation which presupposes a confidence or controlling influence by one party on the mind of another, has existed, the influence acquired by such relation may extend more or less after the period of its termination, and when such is the case, the transaction will be scrutinized with the same jealousy as if the relation continued. Yet it is only where the evidence shows that such influence extended after the period of the confidential relation, that the principle applies.

In deciding this issue, the doubt entertained by the court of the right to set aside the transfer of the equity on account of the circumstances under which it was made, has substantial weight. If the plaintiff had been wronged in the original transaction, he was fully aware of it at the time the defendant offered to rescind. The fiduciary relation no longer existed, and there is nothing in the record to show, that it once existed, had any influence at the time defendant offered to rescind. The plaintiff was then holding fast to all he had received and refusing to put the defendant in *statu quo*, but was demanding the defendant to make a new contract with him and buy his property at a higher price.

The plaintiff instituted this suit in equity to rescind the contract at a time when he knew it was impossible to restore things to the situation they were in at the time the contract was made. The evidence shows that while it was possible so to do, he at all times maintained that he did not want a restoration. It is well settled that a litigant coming into a court of equity,

must come with clean hands, and the rule is applicable to the facts of this case. The defendant acted in good faith in the transaction, and made a contract at the request of the plaintiff. Afterward, and at a time when the defendant was in a position to restore to plaintiff what he received under the contract, plaintiff expressed a dissatisfaction therewith, whereupon the defendant offered to rescind the contract and restore to plaintiff all he had parted with, to-wit: The stock of merchandise. To that offer, the plaintiff replied: "I don't want it; it would be only the tail end of a big stock of goods and I would not fool with it." This reply was made to the following statement of the defendant: "If you are dissatisfied with this trade, you give me back my \$500 and give me back my note and you can have the whole thing back, Mr. Heath; you can have whatever it brings or you can let me pay out what is owing and you can have the remainder of the goods." And to this day no word of testimony has ever come from the plaintiff that he ever desired to rescind the contract or wanted the stock of goods returned to him.

A fair interpretation of the evidence leads to the irresistible conclusion that plaintiff never wanted the possession of the stock after the transfer of his equity, and there was no time when he was willing to give up the \$500 cash paid him and the \$1700 note drawing eight per cent interest for his equity in the stock.

It does not seem to us that it would be fair or equitable to permit the plaintiff to sustain this action. When he became dissatisfied with the trade and the defendant offered to rescind and return to him the property, he should have accepted the proposition. He had no right to remain silent, and if for any reason, defendant lost money on the transaction, to stand by the contract; but if defendant made money out of the transaction, repudiate it. To hold that he can recover under such circumstances, is declaring an unjust and unfair rule, and especially so under the facts of this case.

The contract was not void but only voidable at the election of the *cestui que trust*, and if at a time when the elements which made the contract voidable had been removed, plaintiff refused the offer of the defendant to rescind and really did not want to rescind, he certainly can have no standing in a court of equity to compel the defendant to rescind when he has ascertained it will be more profitable to him to do so, than to stand by the contract.

“When one comes into a court of equity to rescind a contract he must be able to show as a primary condition to his right that he has been diligent and that he has been prompt in disavowing the obligation into which he alleges he had been fraudulently led. Negotiations or dealings with the fraudfeasor, respecting the subject-matter of the fraud after discovery, are fatal to the right of repudiation. The party alleging he was defrauded ‘is not at liberty to hesitate and delay, and wait for a future view of his own convenience or the market value of the property.’” [Landon v. Tucker, 130 Mo. App. 704, 107 S. W. 1037.]

The premises considered, we are of the opinion that when all the evidence is considered, the plaintiff is not entitled to recover in this action, and the judgment should be reversed with directions to the circuit court to dismiss plaintiff’s bill. It is so ordered. *Nixon, P. J.*, concurs; *Cox, J.*, not sitting.

JOHN A. PETERS, Respondent, v. WILLIAM F.
CARROLL, Appellant.

Springfield Court of Appeals, February 6, 1911.

1. **DEBTOR AND CREDITOR: Loans: Retaining Part of Loan to Await Perfecting Title.** Plaintiff applied to defendant, an agent for a loan company, for a loan of \$2000 on certain real estate to secure the loan. In his application for the loan he agreed to furnish an abstract showing perfect title in him to the real estate. It appeared that the title was defective. The agent advanced part of the loan to take up a prior mortgage, but held back the remainder until the title could be perfected. In a suit by plaintiff for this balance it is held that plaintiff could not recover without showing a perfect title, even though the loan company had collected interest on the full amount, but whether the loan company was entitled to recover the interest on the face of the loan is not decided.
2. **PRINCIPAL AND AGENT: Agent Acting for Both Parties.** Where the parties have knowledge of the agent's relations to each other and see fit mutually to trust him, there is no legal objection to his acting as agent for both parties.

Appeal from Texas Circuit Court.—*Hon. L. B. Woodside*, Judge.

REVERSED.

William F. Carroll, pro se, appellant.

(1) Agreement to hold money in readiness to loan defendant held to obligate defendant to pay interest during specified period whether he took advantage of the loan or not. *Eblen v. Selden* (Md.), 59 Atl. Rep. 120. A mortgage to cover future advances is valid. *Foster v. Reynolds*, 38 Mo. 556. (2) Plaintiff's obligation was to furnish a perfect title of record satisfactory to the counsel of the investment company. *Marmaduke v. Martin*, 90 Mo. App. 629. (3) The defendant was the

agent of the plaintiff and acted under his instructions, and a written power of attorney. *May v. Ins. Co.*, 72 Mo. App. 286; *Robinson v. Jarvis*, 25 Mo. App. 427. (4) The demurrer to plaintiff's evidence should have been sustained. *Long v. Moon*, 107 Mo. 338; 27 Cyc. 1230.

Thomason & Clark for respondent.

(1) Appellant testified that he was the agent of respondent. He was therefore bound to act with the utmost good faith toward respondent and any obligation assumed by him antagonistic to respondent's interest was contrary to his duty as respondent's agent, and any contract or agreement made with any other person whereby he agreed to act against the interest of respondent was void as against public policy. He could not under the law act as the agent of respondent and Wells & Adams at the same time. *Corder v. O'Neil*, 207 Mo. 632; *Connor v. Black*, 119 Mo. 126; *Atlee v. Fink*, 75 Mo. 100; *DeSteiger v. Hollington*, 19 Mo. App. 388; *Winter v. Carey*, 127 Mo. App. 601. (2) And it matters not whether appellant styles himself a broker, real estate agent, or attorney, this rule applies where his principal is entitled to his care, fidelity or skill in the management of the business entrusted to his care. This rule is of universal application and is not alone confined to the decisions in Missouri, as will be seen by an examination of the following authorities. *Keech v. Bunn*, 116 Ill. App. 397; *Hafner v. Herron*, 165 Ill. 242; *Warrick v. Smith*, 137 Ill. 504; *Scribner v. Collar*, 40 Mich. 375; *Rice v. Davis* (Pa.), 20 Atl. Rep. 513; *Lynch v. Fallon*, 11 R. I. 311; *Rice v. Wood*, 113 Mass. 133; *Levy v. Spencer*, 18 Colo. 532; *Meechem on Agency*, sec. 953. (3) The trial court did not commit error in directing a verdict for respondent. Appellant admitted both by his pleadings and his testimony that he has in his hands the sum of \$140.51 belonging to respondent

that he has not paid to him, and there was, therefore, no issue to be tried by the jury and it was the duty of the court to direct a verdict for respondent. *Ford v. Dyer*, 148 Mo. 528; *Hoster v. Lang*, 80 Mo. App. 234; *Crawford v. Stayton*, 131 Mo. App. 265.

GRAY, J.—This case was tried in the circuit court of Texas county, resulting in a judgment in favor of the plaintiff, from which the defendant appealed.

The plaintiff alleges in his petition, filed December 27, 1909, that the defendant in 1908, was engaged in the real estate, loan and brokerage business in Van Buren, Mo., as the agent for Wells & Adams, loan brokers of Quincy, Ill.; that plaintiff applied to defendant for a loan of \$2000 on certain real estate in Carter county, Mo., owned by the plaintiff; that on January 4, 1909, the defendant accepted the loan and plaintiff delivered to the defendant two deeds of trust upon said property to secure said loan of \$2000, and that he placed said deeds upon the records of Carter county, and forwarded the same and the note secured thereby, to Wells & Adams; that the defendant out of the said \$2000 paid for plaintiff a prior loan on said land amounting to \$1620, and on October 15, 1909, defendant paid to plaintiff the sum of \$150, leaving a balance of \$230 of the \$2000 loan still unpaid, and the defendant refused to pay the same.

The answer was a general denial. And further defendant admitted that as a broker, he negotiated the loan of \$2000 for plaintiff with said Wells & Adams; that in order to secure said loan, the plaintiff made an application in writing, wherein it was stated that he was the owner in fee simple of the land, and that to secure said loan he would execute trust deeds on said property which would be a first lien thereon, and that he would furnish an abstract of title which would show a perfect title in him from the Government down to the date of recording said trust deeds; that the title was

defective, and that Wells & Adams rightfully rejected said title, but forwarded the money to defendant with the understanding that the same was to be paid to plaintiff when the objectionable features of the title had been removed.

The application for the loan was introduced in evidence and fully supported the allegations of the defendant's answer relating thereto. The plaintiff testified that when he made the application for the loan, one Bedell held a first mortgage upon his property, to secure a loan amounting to one thousand six hundred and some odd dollars; that he was anxious to get the money to pay off that encumbrance, as the holder thereof was the owner of lands adjoining his and was anxious to foreclose the mortgage and buy plaintiff's property thereunder; that the defendant told him when the \$2000 had been received from Wells & Adams, that he was not authorized to pay it to plaintiff until the title was complete.

Plaintiff also testified he understood there was a three-eighths claim out on his land, and that the defendant was trying to get that interest, so as to perfect the title; that defendant told him he would protect him from the Bedell mortgage and assumed the responsibility of using enough of the loan money from Wells & Adams to take up the Bedell mortgage, and thereupon he made an agreement with the defendant that the defendant should hold the balance of the money until the title was fixed and Wells & Adams satisfied.

Plaintiff further testified that he understood that if, for any reason, the defendant was unable to get deeds for the outstanding interests, that an action was to be commenced to quiet title to the premises. Plaintiff further testified, however, that he understood that if deeds could not be procured, something would be done at the May term of court to perfect the title.

The undisputed evidence shows there were numerous defects in the title, and that plaintiff's attention

was called to all of them, and that he agreed that the defendant might hold the balance of the purchase money until the title was perfected according to the contract by which the money was secured from Wells & Adams. Also that defendant proceeded to straighten out the title, and did secure deeds for some of the outstanding interests from heirs who lived in California. In September or October, 1909, the defendant paid to the plaintiff out of the money on hand and retained, the sum of \$150, which, together with the amounts previously paid and expenses agreed upon, left due and owing to plaintiff out of the \$2000 loan, \$140.51, to recover which this suit was instituted.

When the defendant paid to the plaintiff the \$150, he notified him that it was going to take further time to perfect the title, and that he would go ahead and do so as attorney for plaintiff, and charge twenty-five dollars therefor, or plaintiff could select his own attorney to bring the suit and perfect the title. Within a short time after the receipt of this letter, the plaintiff instituted this suit.

The above facts are all shown from the plaintiff's own testimony, and in our judgment, the plaintiff was not entitled to recover the money sued for, and the court should so have instructed the jury. Instead of so doing, the court instructed the jury to find for the plaintiff.

It is the contention of plaintiff that the defendant was the plaintiff's agent and could not withhold the money from his principal, and that under no circumstances could he act as the agent of both parties. The plaintiff brought his suit on the theory that the defendant was the agent of Wells & Adams, and must be held to the cause of action stated in his petition. Waiving this point, however, there was nothing in the transaction that prevented defendant from acting as the agent of both parties. If the parties have knowledge of the agent's relation to each and see fit, mutually, to

trust him, there can be no legal objection to his acting for both parties. [Atterbury & Nichols v. Hopkins et al., 122 Mo. App. 172, 99 S. W. 11.]

No advantage has been taken of the plaintiff. His property was encumbered by a mortgage and the holder of it was threatening foreclosure proceedings. He applied, according to his petition to the defendant as the agent of Wells & Adams for a loan to protect his property from sale. The application for the loan was sent to Wells & Adams, and the sum of \$2000 was sent to the defendant to be delivered to the plaintiff when his title was perfected. The defendant assumed the responsibility and violated the instructions of Wells & Adams to the extent of advancing to the plaintiff enough money to satisfy the outstanding mortgage, and to protect plaintiff's land from a foreclosure. It was then agreed between the parties that the defendant should hold the balance of the money until the admitted defects in the title had been removed. The defendant proceeded to remove such defects, and after a part of them had been removed, made another payment to the plaintiff out of the money withheld, in the sum of \$150, and retained the balance under the contract with plaintiff. While the defects were unremoved, the plaintiff brought this suit for the balance of the money.

Wells & Adams demanded and plaintiff paid interest in full on the \$2000 loan, and plaintiff claims that on account thereof Wells & Adams and the defendant are estopped from holding from plaintiff the balance of the loan. We fail to see any force in this contention. The money had been advanced by Wells & Adams and was being retained by the defendant under a contract with plaintiff, until plaintiff could give the title he had contracted to give as security for the loan. Whether Wells & Adams were entitled to recover the interest in full on the loan is not necessary for us to decide in this connection. We only hold that the fact that they did so, did not authorize the plaintiff to institute this suit

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to recover the money which he had agreed defendant could retain until he had perfected his title.

We are of the opinion plaintiff is not entitled to recover in this action, and therefore the judgment of the trial court will be reversed. All concur.

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**C. B. ESTIS, Appellant, v. E. J. HARNDEN et al.,
Respondents.**

Springfield Court of Appeals, February 6, 1911.

1. **REPLEVIN: Sale: Sufficiency of Evidence.** In a replevin suit for a cow which plaintiff claimed to have purchased from defendant, the uncontradicted evidence is *held* sufficient to show that plaintiff had purchased the cow and was entitled to possession thereof upon payment of the balance of the purchase money, and that the trial court erred in finding for the defendants.
2. **CONTRACTS: Sales: Time Not Essence of.** In a replevin suit for possession of a cow which plaintiff claimed to have purchased, the defense was that plaintiff did not come after the cow at the time he agreed to. The evidence is examined and *held* not sufficient to show that the time when plaintiff should call for the cow was the essence of the contract.
3. **———: ———: Time When Essence of.** In determining whether the stipulations as to the time of performance of a contract of sale are conditions precedent, the court seeks to discover the intention of the parties, and if it appears from the language used and the circumstances that time was to be the essence of the contract, stipulations in regard to it will be held conditions precedent.
4. **SALES: Payment: Right of Possession.** When all the terms of a contract for the purchase of personal property have been fully agreed upon and the transfer of possession to the purchaser is subject only to the payment of the balance of the purchase price, the purchaser has become the owner of the property, with the right in the vendor only to retain the possession thereof until the balance of the purchase price has been offered or paid.

Appeal from Jasper Circuit Court.—*Hon. David E. Blair*, Judge.

REVERSED AND REMANDED.

George Booth and *A. M. Baird* for appellant.

(1) A contract for the sale of specific, ascertained goods, then ready for delivery, for a price agreed on vests the property thereto immediately in the buyer, unless it is shown by the language and surrounding circumstances that such was not the intention of the parties, so title to the cow in question passed to appellant at the time he paid the \$2.50 on the purchase price thereof and his right of possession accrued when he demanded possession of the cow offering the balance of the agreed purchase price. *Sigerson v. Kalmann*, 39 Mo. 206; *Williams v. Gray, Adm.*, 39 Mo. 201; *Wheless v. Grocer Co.*, 140 Mo. App. 585; *Kuhler v. Tobin*, 61 Mo. App. 576; *Toney v. Goodley*, 57 Mo. App. 241; *Glass v. Blazer Bros.*, 91 Mo. App. 564; *Nance v. Metcalf*, 19 Mo. App. 189; *Hatch v. Oil Co.*, 100 U. S. 124, 25 Law Ed. 554; *Wren v. Kuhler*, 68 Mo. App. 680; *Mfg. Co. v. Jones*, 64 Mo. App. 223; *Collins v. Lumber Co.*, 128 Mo. 446; *Harding v. Manard*, 55 Mo. App. 364; *Benjamin on Sales* (6 Ed.), secs. 308 to 317. (2) Even if this transaction could be construed as a sale for cash on delivery, which we do not concede, and the rules governing such sales applied, then appellant should recover, for a tender of the balance due on the purchase price was made at the time he demanded possession of the cow under the contract. *Sharp v. Hawkins*, 129 Mo. App. 85; *Frazier v. Railroad*, 104 Mo. App. 359; *Leonard v. Davis*, 1 Black U. S. 476, 17 Law Ed. 225; *Briggs v. U. S.*, 143 U. S. 346, 36 Law Ed. 180; *Wade v. Moffett*, 21 Ill. 110; *Barrow v. Window*, 71 Ill. 214; 2 Com. 447, 1 Cooley's (3 Ed.), 589.

W. R. Shuck and A. G. Young for respondents.

GRAY, J.—This is an action of replevin for a cow, commenced before a justice of the peace in Jasper county. The defendants were successful in the justice court, and the plaintiff appealed to the circuit court of said county. On the trial in the circuit court without a jury, the defendants were again successful, and the plaintiff appealed to this court.

There is but little dispute about the facts. The defendants were originally the owners of the cow and had sent word to the plaintiff that the animal was for sale. The plaintiff, with one Mr. Farris, went to the defendants' premises for the purpose of looking at the cow, with the view of plaintiff purchasing her for Mr. Farris. The defendants are husband and wife. After looking at the cow the plaintiff asked the husband if less than forty-five dollars would buy her, to which the defendant replied: "No, if I wasn't going off sixty dollars wouldn't buy this cow." And the plaintiff replied that he would take the cow and paid to the husband the sum of two dollars and a half on the purchase price. At this time the plaintiff further said: "I will be after the cow Monday," and the said defendant replied: "All right. Probably she won't be here, but she will be over in Carterville; you can get her any time you come after her."

The plaintiff did not go after the cow Monday, and in the meantime defendants had moved to Carterville. On Monday evening the plaintiff went to Carterville and saw the defendant, Mrs. Harnden, and told her he was busy and would like to wait until morning to get the cow, and she replied that it would be all right, to come and get the cow in the morning. The plaintiff did not go after the cow in the morning, and it was about one'clock in the afternoon when he went to the defendants' home after her. The mother of Mrs. Harnden came to the door and told the plaintiff they had decided not to move away, and to keep the cow. About

that time Mrs. Harnden, the defendant, came to the door and notified plaintiff he could not have the cow unless he would pay fifty dollars for her. The plaintiff waited until the husband came home in the evening, and was notified by him also that they had decided to keep the cow, to which the plaintiff replied: "I have got the money to pay for her and would like to have her." The husband replied: "That's all right, I ain't going to let you have the cow to-day."

The above facts are not controverted. The defendants have filed no briefs in this court, but we gather from the bill of exceptions that they defended on the ground that plaintiff did not come after the cow at the time he agreed to, to-wit: Tuesday morning, and that the transaction on Friday evening when plaintiff and Mr. Farris looked at the cow, did not amount to a contract of sale. If the transaction amounted to a sale, then there was nothing in the language used to show that the time when plaintiff should call for the cow was the essence of the contract. The evidence shows that the cow was giving milk and the defendants were having the benefit thereof. When the plaintiff stated that he would come after her Monday, the husband replied: "That will be all right, I am going to move to Carterville and the cow will be over there and come over there and get her."

In determining whether stipulations as to the time of performance of a contract of sale are conditions precedent, the court seeks to discover the intention of the parties and if time appears, from the language used and the circumstances, to be the essence of the contract, stipulations in regard to it will be held conditions precedent. [Redlands Orange Growers Association v. Gorman, 76 Mo. App. 184; Lumber Co. v. Forrester et al., 124 Mo. App. 304, 101 S. W. 164.]

We do not believe that time was the essence of the contract so that the failure of the plaintiff to call for

the cow at any special hour in the day authorized defendants to repudiate the sale.

It is quite clear to us that the transaction amounted to a sale. The defendants asked forty-five dollars for the animal. The plaintiff said he would take her and paid two dollars and fifty cents of the purchase price and said he would come after the cow on the following Monday. All the terms of the contract had been fully agreed upon, and the plaintiff then and there became the owner of the cow with the right in defendants to retain the possession of her until the balance of the purchase price was offered or paid. [Sigerson v. Kahmann, 39 Mo. 206; Stumpf v. Mueller, 17 Mo. App. 283; Glass v. Blazer Bros., 91 Mo. App. 564; Kuhler v. Tobin, 61 Mo. App. 576; Wren v. Kuhler, 68 Mo. App. 680; Wheelless v. Grocery Co., 140 Mo. App. 1. c. 585, 120 S. W. 708.]

When the plaintiff called Tuesday, he notified the defendants he had come to pay for the cow and to get her. They flatly refused to let him have the animal unless he would pay an increased price for her. Upon this refusal, he instituted this suit and deposited the balance of the purchase money with the court, where it remains. Under these circumstances we are of the opinion that he was entitled to recover, and the court erred in rendering a judgment in favor of the defendant.

The premises considered, the judgment of the circuit court will be reversed and the cause remanded with directions to enter judgment in favor of plaintiff. All concur.

C. and A. J. MATTHEWS, Respondents, v. THE
PHOENIX INSURANCE COMPANY, Appellant.

Springfield Court of Appeals, February 6, 1911.

APPELLATE PRACTICE: Failure to File Brief. When appellant files in the appellate court nothing but a printed abstract—no statement or assignment of errors, as required by the statute and rules of the court, the appeal will be dismissed.

Appeal from Scott Circuit Court.—*Hon. Henry C. Riley, Judge.*

Oliver & Oliver and Barclay, Fauntleroy & Cullen
for appellant.

J. H. Hale and Frank Kelly for respondents.

GRAY, J.—This cause is in this court on a transfer from the St. Louis Court of Appeals. Both parties have appeared generally in this court.

The suit originated before a justice of the peace, and is based on an insurance policy issued by the appellant, March 6, 1906. The plaintiffs were successful in the justice court. On trial in the circuit court, the plaintiffs were again successful, and the defendant appealed.

The appellant has filed in this court a printed abstract in lieu of full transcript, but nothing more. No statement or assignment of errors, as required by the statute or our rules, has been filed. The result of such failure is the dismissal of the appeal. [*Wade v. Bankers Life Ins. Assn.*, 129 S. W. 1004; *Disse v. Frank*, 52 Mo. 551; *Snyder v. Free*, 102 Mo. 325, 14 S. W. 875; *Halstead v. Stone*, 147 Mo. 649, 49 S. W. 850.]

The appeal is dismissed. All concur.

WEEKS-BETTS HARDWARE COMPANY, Respondent, v. ROOSEVELT LEAD & ZINC COMPANY, Appellant.

Springfield Court of Appeals, February 6, 1911.

1. **LANDLORD AND TENANT: Mines and Mining: Tenant's Right to Remove Improvements.** Plaintiff instituted suit to recover possession of certain mining machinery, consisting of a sludge table, dummy elevator and gas pipe, claiming the same under a chattel mortgage from one of the defendants. The appellant had a mining lease upon the land on which the machinery was located and claimed the machinery under a sub-lease with the same defendant, by the terms of which all improvements and repairs necessary to keep the plant in good running order and repair, which were made by said defendant, were to become the property of appellant. *Held*, under the evidence that the sludge table, etc., were not improvements and repairs put on the property by the sub-tenant in order to keep the plant in good running order and therefore appellant was not entitled to retain the same.
2. ———: ———: ———: Where a lessee under a mining lease erects a mining plant and installs machinery for the purpose of mining, cleaning and preparing ore for market, it had the right to remove the same at the end of the term in the absence of a contract to the contrary.
3. ———: **Fixtures: Tenant's Right to Remove Improvements.** The common law rule relating to fixtures and improvements put upon property by a tenant has been relaxed, and what would be a fixture as between vendor and vendee, or mortgagor and mortgagee, would not be between landlord and tenant.
4. ———: ———: ———: The law is liberal toward tenants who make improvements for their own particular use, which can be removed without substantial injury to the rented premises.
5. ———: ———: ———: **Contracts: Construction.** Covenants restricting the tenant's ordinary right to remove trade fixtures are always strictly construed.
6. **CONTRACTS: Construction.** Contracts must be construed with reference to the surrounding circumstances and conditions of the parties.
7. **LANDLORD AND TENANT: Removing Fixtures: Waiving Matter of Removal Within Reasonable Time.** When a demand

was made by the plaintiff upon the appellant for the possession of certain mining machinery and fixtures, the appellant claimed to be the owner of the property under a mining lease with its tenant and refused to deliver possession upon such grounds. *Held*, that after suit by plaintiff for possession appellant is in no position to urge that plaintiff forfeited its right to the property by not removing the same within a reasonable time after the expiration of the lease.

Appeal from Jasper Circuit Court.—*Hon. Henry L. Bright*, Judge.

AFFIRMED.

W. R. Robertson for appellant.

(1) Irrespective of the provisions of the lease the sludge table, dummy elevator and appurtenances became a part of the leasehold when placed thereon by the lessees and respondent acquired no interest therein by reason of its chattel mortgage. *Donnewald v. Real Estate Co.*, 44 Mo. App. 350; *Ottumwa Iron Works v. Muir*, 126 Mo. App. 587; *Hopewell Mills Co. v. Bank*, 23 N. E. (Mass.) 327; *Chatterton v. Saul*, 16 Ill. 150, 19 Cyc. 1074. (2) Where the lease provides that all improvements made by the tenant shall, at the expiration of the term, become the property of the lessor, the improvements are not confined to merely such property as the law designates as improvements, and embraces all additions, erections, or alterations made by the tenant during the term. 24 Cyc. 1102. (3) The tenants, in whose stead respondent in this case stands, must remove their fixtures, even though they be trade-fixtures, before the expiration, forfeiture or abandonment of the leased premises and before quitting possession. 2 *Taylor's Landlord and Tenant* (9 Ed.), 551; *Kuhlmann v. Meier*, 7 Mo. App. 260; *Welch v. Schler*, 20 Mo. App. 380.

Horace Merritt for respondent.

(1) The provision in the contract that repairs, replacements and improvements should become the property of the Roosevelt Lead & Zinc Co., is a forfeiture provision in the nature of a mortgage on property to be acquired in the future, and will not be permitted nor sustained, being a fraud upon the plaintiff and others who might extend credit or purchase the property from the mortgagor, John W. McClellan & Company. *France v. Thomas*, 86 Mo. 80; *Littlefield v. Lemley*, 75 Mo. App. 46; *Gregor v. Tavener*, 38 Mo. App. 627; *Bank v. Bank*, 171 Mo. 307. (2) Machinery furnished to the owner of a mine and not intended to become an immovable fixture; does not lose its character of personal property. Whether a chattel becomes a fixture is decided by its real or constructive annexation to the realty; its fitness to the uses of the realty and the intention of the party making the annexation. The last has preeminence and the other two are chiefly of value as evidence to the third. *Ottumwa Iron Works v. Muir*, 126 Mo. App. 582.

GRAY, J.—This action was instituted in the circuit court of Jasper county, October 30, 1909, by the plaintiff to recover the value of certain mining machinery. At the time the suit was instituted the appellant herein, the Roosevelt Lead & Zinc Company, a corporation, was not made a party defendant. An amended petition was filed in which the following allegation relating to the appellant is found: "Plaintiff states that the Roosevelt Lead & Zinc Company is now in possession of said property and holding same and is claiming to hold some interest in said property and objecting to the plaintiff taking possession of same, and this amended petition is filed for the purpose of bringing said Roosevelt Lead & Zinc Company into court as a defendant that it may set up its claim if any it has." The appel-

lant appeared in obedience to summons and filed its answer consisting of a general denial. The cause was tried without a jury, resulting in a judgment in favor of plaintiff, and the appellant appealed.

The plaintiff's petition alleged that it was the owner and entitled to the possession of one sludge table, about 3600 feet of 2-inch gas pipe; one dummy tailing elevator, including belts, cups and appliances, located on the McKinley lease on the Connor land near Prosperity, Missouri; that the plaintiff was entitled to the possession of said property by virtue of a chattel mortgage executed to it by the defendant, John W. McClellan & Company, on the 20th day of November, 1908, and duly recorded in the office of the Recorder of Deeds of Jasper county, Missouri, and which mortgage was executed for the purpose of securing the payment to plaintiff of two promissory notes amounting to \$509.19; that the notes were past due and unpaid, and plaintiff had demanded possession of the property from the defendants, and possession had been refused; and further praying for damages for the unlawful detention and conversion of the property.

The testimony tended to prove that the appellant was the owner of a mining plant and mining lease on a tract of land in Jasper county, known as the Connor land; that the defendant, McClellan & Company had a contract or lease with the appellant for one year, with an option to purchase the mill or lease within the one year; that previous to the time of the execution of that contract, other parties had been in possession of the mill, and operating it under similar contracts. There was no sludge table or dummy elevator at the plant when the contract between the appellant and McClellan was entered into. At one time a sludge table had been used in connection with the plant, but the same had been moved away, and nothing but the foundation remained.

The relation that the sludge table bore to the mining plant was shown by the testimony of the plaintiff's witness, Mr. Weeks, as follows:

"Q. Mr. Weeks, tell the court whether or not the removal and taking away of a sludge table from the mill when it was there in a position this was in, would interfere with the operation of the main mill? A. No, sir, it is not a part. Those additions are of very recent date, the mill run for many years without any sludge apparatus.

"Q. Now, in taking it away, would there still be a complete concentrating plant? A. Certainly.

"Q. The attachment to the mill was merely the connecting of the power to run such table? A. Yes.

"Q. That is all the attachment there was to the mill? A. Yes, throw the belt off and cut out that part.

"Q. And the cable to this dummy elevator was merely a different way of communicating power, one by belt and one by cable? A. Connected by a cable to a different place.

"Q. It was not tied to the cable or a cable belt? A. Yes, a transmission cable.

"Q. The dummy elevator might be taken away without interfering with the operation of the mill? A. It run many years without one.

"Q. How is this sludge table fastened so far as to ground or foundation? A. It has a separate foundation of its own.

"Q. These sludge tables, just tell the court what is necessary in the moving—taking them up and moving? A. Very easy to move. Of course, they are not a very large concern, put them on the wagons, just simply a table, about the same pattern, while they are a great many different makes, they are practically the same."

And on cross-examination:

"Q. Mr. Weeks, the sludge table is set on a cement foundation, is it not? A. I think it is in that case.

"Q. The cement foundation is set in the ground?

A. Yes, sir.

"Q. And the sludge table is the table that is used to further clean the ore that is milled in the concentrating plant? A. No, not further clean the ore of this mill, it is to extract the sludge.

"Q. Let me get at it this way: As a result of operating on the mill proper, as originally constructed, there is simply the jig tanks, crushers and so on, and leaves what is called sludge? A. Yes.

"Q. And in that sludge there is more or less ore?

A. Yes.

"Q. This sludge table is used to extract that? A. Yes, sir."

Thus it will be seen that the sludge table and dummy elevator were simply additions to the mill and added to it by McClellan & Company after that company had contracted with the appellant.

It is further shown that in taking away the dummy elevator and sludge table, no injury would be done to the real estate and they were simply "trade fixtures." [Powell v. Plank, 141 Mo. App. 406, 125 S. W. 836.]

There is no dispute about the facts and the rights of the parties must be determined by the construction of the paragraph in the contract between McClellan & Company and the appellant, and reading as follows: "The second party further agreed to keep the mining plant hereby leased in good repair and to make all improvements, repairs and replacements necessary to keep the same in good running order and repair, and to pay for such at their own expense, but such improvements, repairs and replacements, when made, shall become a part of the mill and the property of the first party and shall be delivered to the first party at the expiration of this lease whether by lapse of time or forfeiture."

It is the contention of the appellant that under this clause of the contract, it became the owner of all improvements and additions made upon the mill and

property by McClellan & Company while in possession of the property under the contract. It is the contention of the respondent that the clause of the contract does not include the machinery in controversy.

This contract must be construed with reference to the fact that plaintiff's evidence tends to prove that the appellant was not the owner of the land, but only had a mining lease thereon, and if its mining plant and machinery were erected for the purpose of mining, cleaning and preparing ore for market, then it had the right to remove the same at the end of its term, and the same were personal property. [Investment Co. v. Cunningham, 113 Mo. App. 519, 87 S. W. 605.]

We are then confronted with the proposition that the property in question was personal property and the parties were dealing with it as such. The common law rule relating to fixtures and improvements put upon property by a tenant, has been relaxed and what would be a fixture as between vendor and vendee or mortgagor and mortgagee, would not be between landlord and tenant. The property in controversy when it was purchased, was undoubtedly the property of McClellan & Company, and if it ever became the property of the appellant, it was because it was transferred to the appellant by McClellan & Company by the terms of the contract just quoted.

Contracts must be construed with reference to the surrounding circumstances and the condition of the parties. The law is liberal toward tenants who make improvements for their own particular and temporary use, which can be removed without working substantial injury to the rented premises. [Bircher v. Parker, 40 Mo. 118; State v. Newkirk, 49 Mo. 84.]

It will be noticed the contract placed upon McClellan & Company the obligation to keep the mining plant in good repair and to make all improvements, repairs and replacements necessary to keep the same in good running order and repair. And such improvements,

when made, became a part of the mill and the property of the first party. The contract does not provide that all improvements placed upon the property shall become the property of the appellant, but only such improvements and repairs as were necessary to keep the plant in good repair.

It seems to us that the primary purpose of this clause was to require McClellan & Company to keep the property in repair and to make improvements necessary therefor. And it does not provide that all improvements placed upon the plant shall become the property of the appellant, but only such improvements as become necessary to keep the property in running order and repair. If it was the intention that the appellant should have all the improvements placed upon the property, why did not the contract so state, instead of limiting the right of appellant to such improvements as were necessary to keep the mill in repair. The testimony shows that the sludge table and dummy elevator were no part of the mill when the contract was entered into. The mill was complete and in running order without them, and McClellan was not required to purchase them and install them in order to comply with his contract.

Covenants restricting the tenant's ordinary right to remove trade fixtures are always strictly construed. [Fox v. Lynch, 64 Atl. 439; Montello Brick Co. v. Trexler, 167 Fed. 482; Wright v. LaMay, 118 N. W. 964; Hey v. Bruner, 61 Pa. 87; Bernheimer v. Adams, 67 N. E. 1080, 175 N. Y. 472.]

In Montello Brick Co. v. Trexler, *supra*, the landlord had leased premises upon which were three complete brick plants at the time the lease was entered into. The lease contained the following clause: "At the expiration of the term hereby created, the lessee shall return and surrender to the lessor the demised premises in good order and condition, and with all improvements, additions and extensions without any compensa-

tion to be paid for said improvements, additions and extensions." The lessee erected upon the leased premises an additional plant, and afterwards was adjudged a bankrupt. The lessor claimed the new plant under the terms of the lease, but the court held that the clause in the lease restricting the right of the tenant to remove his "trade fixtures," must be strictly construed, and it did not apply to the new plant erected by the lessee upon the premises.

In *Hey v. Bruner*, *supra*, the lessees covenanted: "And at the expiration of the said term shall and will quietly and peaceably yield up and surrender the possession of the said premises demised, together with all and every the improvements and additions which they the said lessees, shall construct and make thereon unto the lessor, in good order and condition. reasonable wear and tear excepted. Lessees shall forthwith take possession, and shall with all convenient dispatch make alterations, additions and improvements of a permanent character to consist of items agreeably to a specification and plan to be approved by the lessor, and to introduce machinery necessary to the purpose of their business, hosiery manufacturing, permanent additions and improvements to remain on the property at the expiration of this lease and to belong to the owners of the fee to said premises." It was held that although the lessor by this lease, intended that the machinery installed should belong to him at the expiration of this lease, yet he did not expressly provide, and therefore, there was no doubt under the lease that lessee had a right to remove the fixtures, consisting of engine, boiler, shafting, hosiery machinery, etc., as trade fixtures.

In *Fox v. Lynch*, *supra*, the defendant leased the premises for saloon purposes and agreed with the lessor to keep the same in repair, and at the end of the term to surrender the premises in as good condition as the same were when received, ordinary wear and tear ex-

cepted. During the term of the lease, the lessee removed all the old fixtures and installed others in their stead. In a contest between him and the landlord, the court held that he had a right to remove all the new fixtures substituted for the old ones on the premises at the time he entered into his lease.

When we construe this contract as the law says we shall, strictly in favor of the rights of the tenant, then we must hold that the sludge table and dummy elevator were not improvements and repairs placed on the property by the tenant in order to keep the same in proper repair and running order, and that only such improvements and repairs became the property of the appellant as were necessary for that purpose.

The appellant also claims that the property was not removed from the premises at the expiration of the rights of McClellan & Company, and therefore, the right to take the same was forfeited. The appellant claimed to be the owner of the fixtures under the contract, and based its right, when respondent asked for the property, upon such grounds. By so doing, it is in no position to now urge that respondent forfeited its right to the property by not removing the same within a reasonable time. [Bernheimer v. Adams, 67 N. E. 1080, 175 N. Y. 472.]

It necessarily follows that the judgment is for the right party and should be affirmed. All concur.

L. A. CHRISTY, Respondent, v. J. M. BUTCHER,
Appellant.

Springfield Court of Appeals, February 6, 1911.

1. **PLEADING: Negligence: Willfulness: Inconsistent Pleading: Willfully and Negligently Spreading Contagious Disease.** In a suit to recover damages from defendant for communicating smallpox to plaintiff and her family, the petition was in one count and charged defendant with "knowingly and intentionally" communicating the disease, and in another part of the petition charged the defendant with negligence which resulted in communicating the disease. *Held*, that the allegations were inconsistent and that the demurrer to the petition should have been sustained.
2. ———: ———: ———: ———. In actions for damages charging negligence where the petition alleges "gross negligence" or "willful negligence," the words "gross" or "willful" may be treated as surplusage in such pleadings, and the petition construed as stating merely an action for negligence. But it is improper to charge that one caused injury to another by careless, negligent, wanton and willful misconduct.
3. ———: ———: ———: ———. There is a distinction between ordinary negligence and intentional wrong. When willfulness enters, negligence steps out. The former is characterized by advertence, and the latter by inadvertence.
4. ———: ———: ———: ———: **May be Attacked by Demurrer.** When a petition in one count alleges the injury incurred was caused by the negligence of the defendant, and also by the willful act of the defendant, it is proper to attack it by a demurrer and not by motion to require plaintiff to elect.

Appeal from Greene Circuit Court.—*Hon. Alfred Page*,
Judge.

REVERSED AND REMANDED.

A. H. Wear, L. H. Musgrave and Wright Bros. for
appellant.

(1) Proof of negligence necessarily disproves willfulness, and vice versa, and for this reason they could

not be joined in the same count. *Waechter v. Railroad*, 113 Mo. App. 277; *Boyd v. Transit Co.*, 108 Mo. App. 305; *Raming v. Railroad*, 157 Mo. 508; *Bindbeutel v. Railroad*, 43 Mo. App. 463; *O'Brien v. Looms*, 43 Mo. App. 29. (2) Demurrer available remedy. *Boyd v. Transit Co.*, 108 Mo. App. 305. (3) Motion in arrest available. *Clippard v. Transit Co.*, 202 Mo. 432.

Val Mason and Addison Brown for respondent.

(1) As appellant refused to argue the demurrer filed to the amended petition in the trial court, respondent could not definitely decide then what but one of the objections raised was, and that in demurring because two or more causes were improperly joined appellant was in gross error, because a demurrer is not the proper remedy except in cases where two causes are united which cannot be stated in the same petition. *Mulholland v. Rapp*, 50 Mo. 42; *Otis v. Mechanics Bank*, 35 Mo. 128; *State ex rel. Ziegenhein v. Tittman*, 103 Mo. 553. (2) Appellant has no ground for motion to separately state or elect under facts showing concurrent violation of common law duty, ordinance duty and duty established by general custom; they were perfectly compatible and were not either repugnant, inconsistent or untrue and such a motion would not have been sustained. *White v. Railroad*, 202 Mo. 539; *Haley v. Railroad*, 197 Mo. 15. (3) Appellant knew he was violating his duty, when he knowingly subjected and communicated to respondent the disease. Under the facts pleaded could he say truthfully that it was unknowingly and unintentionally done? He was consciously violating his duty, their peril was known to him, he continued to act in utter disregard of their safety and rights after discovering their peril. Such conduct was wanton and inhumane. The legal conclusion to be drawn from an averment of such specific facts stated is that it was willful. In many jurisdictions such negligence is denom-

inated willful negligence. Railroad v. Rice, 38 Southern 857; Fisher v. Railroad (Ind.), 45 N. E. 689; Labargs v. Railroad, 134 Mich. 139, 95 N. W. 1073; 29 Cyc. 509; Railroad v. Ader, 110 Ind. 376, 7 N. E. 439; Sloniker v. Railroad, 79 N. W. 168, 76 Minn. 306; Thomason v. Railroad, 51 S. E. 443; Garth v. Traction Co., 42 Southern 627; Bussey v. Railroad, 55 S. E. 163. (4) The conduct would be equally culpable whether it was hoped it would be contracted or not, it being immaterial whether it was so willed or not as either a matter of fact or law. Franklin v. Butcher, 144 Mo. 660; Hendricks v. Butcher, 144 Mo. App. 671. (5) Intention or knowledge cuts but little figure in such cases. Raming v. Railway, 157 Mo. 505; Jenkins v. Fowler, 24 Penn. St. 308; Cooley on Torts, 694. (6) The specific facts stated in the petition control the general averments made and the *felo de se* doctrine has no application where the facts are stated. McCarty v. Hotel Co., 144 Mo. 402; Dritt v. Snodgrass, 66 Mo. 286. (7) The facts stated state negligence, strictly speaking, but by legal construction they constitute willfulness. 29 Cyc. 510. (8) If the word willful is used to characterize the word negligence, it is to be treated as surplusage. Taylor v. Holman, 45 Mo. 371. (9) The *felo de se* doctrine has no application to a petition where the facts are stated and the doctrine itself in such cases as the one at bar has been destroyed by the Supreme Court in the following cases, to-wit: O'Brien v. Transit Co., 212 Mo. 269; Everitt v. Railroad, 214 Mo. 85; Young v. Railroad, 227 Mo. 332.

GRAY, J.—This is an appeal by the defendant from a judgment of the circuit court of Greene county, in an action instituted by plaintiff to recover damages from the defendant for communicating smallpox to plaintiff and her family. The defendant filed a demurrer to the petition, and the court overruled the same.

The only issue on this appeal is the action of the court on the demurrer. The petition contains much surplusage and immaterial matter, and would not be attractive to a pleader searching for "a plain and concise statement of the facts constituting a cause of action without unnecessary repetition," as required by the statute.

The petition is in one count, and the appellant charges that it alleges the injury incurred was caused by the negligence of the defendant, and also by the willful act of the defendant. If appellant is correct, then the demurrer should have been sustained. [Waechter v. Railroad, 113 Mo. App. 270, 88 S. W. 147; O'Brien v. Transit Co., 212 Mo. 59, 110 S. W. 705; Raming v. Railroad, 157 Mo. 1. c. 508, 57 S. W. 268; Rideout v. Winnebago Traction Co., 101 N. W. 672, 69 L. R. A. 601.]

The petition alleges: "That defendant thereafter well knowing that he was afflicted with said above mentioned disease and that the same would be communicated to plaintiff and her family and her boarders and would destroy her business and endanger the health and lives of herself and family continued for several days to abide in said house without apprising her of the character of the disease, to-wit: smallpox, with which he was afflicted; but kept the nature of his ailment a secret; that doing so in such condition and under such circumstances, defendant was willfully and intentionally neglectful of the rights of the plaintiff herein and was acting in utter disregard of his duty towards her, her family and members of the community generally."

The petition then alleges that a certain ordinance was in force in the city of Springfield, requiring persons to make immediate report to the mayor of contagious or infectious disease of persons, and making it a misdemeanor for a person who has knowledge of the existence of such disease to fail to give such notice. That

said defendant well knowing he had the disease and its contagious character, negligently failed to observe the ordinance, but negligently continued to remain in plaintiff's house and to mingle with plaintiff and the other occupants thereof, without notifying them of the nature of his malady; "that he failed to observe the general and usual custom or precaution exercised under similar circumstances thereby negligently subjecting them to said disease in violation of said ordinance and general custom, and of his duty to the plaintiff therein. That plaintiff and her three children solely on account of the said negligence of defendant in failing to observe said ordinance and custom and duty towards plaintiff on account of his condition which he well knew, contracted from the said defendant the said disease, and that she and her children were taken to the 'pest camp,' which was a place in the outskirts of the city supplied with none of the conveniences and scarcely any of the necessities of life. That by reason of said premises and on account of the said willful acts of the defendant in so knowingly and intentionally communicating said infectious and contagious disease to plaintiff and her family and her boarder, the plaintiff has been to great trouble and expense," etc.

It will be noticed the petition first alleges that the defendant knowing he was inflicted with smallpox, and that the same would be communicated to plaintiff, continued to abide in plaintiff's house without apprising her of his condition, and in so doing under such circumstances he was willfully and intentionally neglectful of the rights of plaintiff. It is claimed by the appellant that this is a charge of willfulness, and the respondent, that it is a charge of negligence. We are inclined to agree with the appellant. There is a distinction between ordinary negligence and intentional wrongdoing. When willfulness enters, negligence steps out. The

former is characterized by advertence, and the latter by inadvertence. "The one requiring intent, actual or constructive to injure, and the other being inconsistent therewith. The practice of charging that one caused injury to another by careless, negligent, wanton and willful misconduct, or of using language of similar import in attempting to state a cause of action is improper." [Rideout v. Winnebago Traction Co., *supra*; Bolin v. Railroad, 84 N. W. 446, 81 Am. St. Rep. 911.]

In the Bolin case, the court said: "Inadvertence, in some degree is the distinguishing characteristic of negligence, while misconduct of a more reprehensible character, characterized by rashness, wantonness and recklessness of a person as regards the personal safety of another, has been designated by this court as gross negligence. That involves 'a sufficient degree of intent at least to be inconsistent with inadvertence.'"

In this state where the allegation is confined to a charge of "gross negligence" or "willful negligence," our courts have construed the words "gross" and "willful" as surplusage in such pleadings, and have held the pleading simply stated a case of negligence. [McPheeters v. Railroad, 45 Mo. 22; Reed v. Telegraph Co., 135 Mo. 661, 37 S. W. 904; Mueller v. Ins. Co., 45 Mo. 84; Taylor v. Holman, 45 Mo. 371.]

The principle is well illustrated by the language of the court in Richter v. Harper, 54 N. W. 768, as follows: "The word 'willful' is employed in the declaration, which charges that the defendant 'willfully, wantonly, negligently, and unlawfully' caused the fire to be set. If the word 'willful' stood alone, or was coupled with other words which implied a purpose to do a direct injury to the property of the plaintiff, this contention would be of more force; but where the word is used in connection with others imputing negligence it is not the rule that the plaintiff must show the appropriateness of every adjective employed in his declaration."

In *Bindbental v. Street Ry. Co.*, 43 Mo. App. 463, the court dealt with the question in the following language: "The defendant assails the judgment on the ground that the court erred in giving the fourth instruction for the plaintiff, which told the jury, 'if the gripman intentionally and carelessly ran the defendant's car against the plaintiff's wagon, that this was negligence.' This instruction, in effect, told the jury that willfully and intentionally were convertible terms, and that maliciously meant intentionally and wrongfully. The terms 'carelessness' and 'negligence,' in the law, are synonyms. And so, too, are the terms 'willfully' and 'intentionally.' The instructions complained of declared that 'intention' is a legal ingredient of negligence. The books on negligence are generally agreed that 'intent' is not included in the essentials of negligence. It is too clear for argument that the two terms 'carelessness' and 'willfulness' are not equivalents, the one of the other, in any legal sense; they are repugnant and inconsistent in their signification and meaning. An instruction is not to be tolerated which proceeds upon the idea that it may be good either for willful injury or for negligence. To say that an injury resulted from negligent and willful conduct of another is to affirm that the same act is the result of two exactly opposite mental conditions."

Our construction of this part of plaintiff's petition is borne out by the plaintiff's construction as shown in the latter part of her petition where it is alleged: "That by reason of said premises and on account of the said willful acts of the defendant in so knowingly and intentionally communicating said infectious and contagious disease to plaintiff," etc. Here the charge is in plain language that the defendant "knowingly and intentionally" communicated the disease to the plaintiff and her family.

Another part of the petition charges the defendant failed to observe the provisions of a municipal ordi-

nance, and that such act was negligence, and that on account thereof the plaintiff's injuries were sustained. It is also alleged in the petition that plaintiff negligently failed to observe a custom, and on account thereof, plaintiff's injuries were received.

It is our opinion the petition charges in the one count that plaintiff's injuries were caused by the willfulness of the defendant, and also by his negligence.

The respondent contends that a motion to require the plaintiff to elect was the proper remedy, and that the demurrer was not. Undoubtedly, in some jurisdictions the motion to elect or to make more definite and certain is the proper practice. [Rideout v. Winnebago Traction Co., supra, (Wis.).] But in this state, our courts hold that a demurrer is the proper pleading. [Raming v. Railroad, supra; O'Brien v. Transit Co., supra.]

The judgment will be reversed and the cause remanded, permission granted to the plaintiff to amend her petition, if she so desires. All concur.

CAPE GIRARDEAU BELL TELEPHONE COMPANY, Respondent, v. THE ESTATE OF T. J. HAMIL, Deceased, Appellant.

Springfield Court of Appeals, February 6, 1911.

1. **ASSIGNMENTS: Voluntary Payments: Assignment After Payment.** Decedent was killed while in plaintiff's employ and plaintiff paid the expenses of the funeral. Later a judgment was obtained against plaintiff on account of the death of the employee, and two years subsequent to paying the funeral expenses, plaintiff procured assignments of the accounts and filed its claim on the same in the probate court. The evidence is examined and *held* to show that plaintiff had in the first instance voluntarily paid the accounts and that no subsequent assignment of the same could be made.

2. ———: ———: ———. When a party who has no interest to protect pays the debt of another without any request from the debtor, and when he is under no legal obligation to pay it, and pays it with no understanding at the time that an assignment is contemplated, he cannot afterwards, when it suits his convenience, change front, secure an assignment of the debt and enforce collection from the debtor.
3. ———: ———: Party in Interest: Subrogation. A party who has an interest in property to protect, and to do so pays an incumbrance thereon, may be subrogated to the rights of a holder of the debt and the law will treat him as the purchaser of the debt in order to protect him, even though no assignment of the debt was taken at the time.

Appeal from Cape Girardeau Court of Common Pleas.—
Hon. R. G. Ranney, Judge.

REVERSED.

L. I. Bowman and Frank Kelly for appellant.

(1) The telephone company knew every fact connected with the accounts when it paid them, and of their own will made a voluntary payment with full knowledge, no fraud, no duress, and it cannot recover. *American Brewing Co. v. St. Louis*, 187 Mo. 367; *Teasdale v. Stoller*, 133 Mo. 645; *Stoll ex rel. v. Stenetticet*, 92 Mo. App. 220; *Campbell v. Clark*, 44 Mo. App. 249; *Meir v. Meir*, 88 Mo. 566; 30 Cyc. 1298.

Oliver & Oliver for respondent.

(1) The first, if not the only question in this case, is: Was the assignment of this claim from the undertaker Hoch to the respondent, a purchase of it, or was it a payment of it? If it was a purchase of the claim the finding of the lower court was correct and its judgment should be affirmed. *Vanstandtz v. Hobbs*, 84 Mo. App. 631; *Swope v. Leffingwell*, 72 Mo. 348; *Campbell v. Allen*, 38 Mo. App. 27; *Campbell v. Roeder*, 44 Mo. App. 324. (2) Where one owing a note or debt pays the

money the transaction is presumed to be a discharge of the debt; but where one, not the debtor or payor pays the holder or the creditor and takes the obligation with an endorsement or assignment, the transaction is presumed to be a purchase; and possession of the instrument with the endorsement entered thereon is prima facie ownership and the fact that the note is past due will not alter or change this presumption. *Marshall v. Meyers*, 96 Mo. App. 643; *Campbell v. Allen*, 38 Mo. App. 27. (3) The trial court sitting as a jury in this case found from the evidence adduced that respondent purchased the account from the undertaker and took an assignment of it, and that it was not a payment of the account. This court will not discredit nor disturb that finding if there is any substantial testimony to support it. *Pickens v. Railroad*, 125 Mo. App. 674; *Everman v. Eggers*, 106 Mo. App. 732; *Veale v. Greene*, 105 Mo. App. 182; *Garner v. Railroad*, 128 Mo. App. 408. (4) Where services are rendered by one for another, they are presumed to be for hire and not gratuitous, and this principle has been applied in making a husband liable for the funeral expenses of his wife, although he was beyond the seas at the time of her funeral; and also in making an estate liable for the funeral expenses of the deceased where the executor neglected to give the necessary orders for the funeral. *Lawson on Contracts* (2 Ed.), 53 and 51; *Allen, Adm., v. College*, 41 Mo. 308; *Hart v. Hart's Adm.*, 41 Mo. 446; *Coleman v. U. S.*, 152 U. S. 96; 1 *Parson on Contracts* (6 Ed.), 493.

COX, J.—Thomas J. Hamil was an employee of plaintiff, and was killed by coming in contact with a live wire in July, 1907. The plaintiff soon thereafter paid the funeral expenses of the deceased. J. A. Hamil was appointed administrator of the estate of deceased and later brought suit against plaintiff and recovered judgment for \$1875, damages on account of the death of Thomas J. Hamil. Plaintiff paid this judg-

ment, then about November 1, 1909, secured an assignment to it of the accounts for the funeral expenses paid by it over two years prior thereto, and presented these accounts to the court of common pleas of Cape Girardeau, which exercised probate jurisdiction, for allowance against the estate of Thomas J. Hamil. The account was allowed and the administrator has appealed.

The only question to determine here is whether the finding of the court is supported by substantial testimony. If it is so supported the court's finding is binding upon us.

Plaintiff contends that it purchased the accounts, while defendant insists that plaintiff voluntarily paid the account and did not purchase it. It is conceded that plaintiff paid to the creditor the amount of the claim and that no assignment was taken or asked for at the time. The only thing said at the time by the party making the payment to the creditor was that if the family should offer to pay the bill for him to accept it. Did this show a purchase of the account or a payment of it? To our mind it negatives the idea of a purchase, and, on the contrary, shows a voluntary payment with a suggestion that if the friends of the deceased wished to reimburse plaintiff for the payment it would be accepted. This was not a purchase of the account at that time, and procuring an assignment of the account two years thereafter and after plaintiff had been compelled to pay a judgment against it for damages did not, and could not, convert the payment into a purchase.

A party who has an interest in property to protect, and to do so, pays an incumbrance thereon, may be subrogated to the rights of the holder of the debt and the law will treat him as a purchaser of the debt in order to protect him even though no assignment of the debt was taken at the time; but when a party who has no interest to protect pays the debt of another without

any request from the debtor and when he is under no legal obligation to pay it, and pays it with no understanding at the time that an assignment is contemplated cannot afterward, when it suits his convenience to change front, go then and secure a formal assignment of the debt and enforce collection from the debtor. [Bunn v. Lindsay, 95 Mo. 250, 7 S. W. 473; Crane v. Noel & Cohn, 103 Mo. App. 122, 78 S. W. 826.]

The payment of the debt in this case was voluntary when made and plaintiff must be bound by it. The result is that plaintiff has no cause of action. Cases to which we are cited by respondent, Vanstandz v. Hobbs, 84 Mo. App. 628; Swope v. Leffingwell, 72 Mo. 348; Campbell v. Allen, 38 Mo. App. 27; Campbell v. Roeder, 44 Mo. App. 324, are not in conflict with our holding in this case. Judgment reversed. All concur.

PATTI DE VAN ROSE, Respondent, v. WALTER THOLBORN, Appellant.

Springfield Court of Appeals, February 6, 1911.

1. **SLANDER: Privileged Communication: Qualified Privilege.** Privileged communications are of two characters, absolute and qualified. A qualified privilege extends to all communications made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he owes a duty to a person having a corresponding duty or interest and to cases where the duty is not a legal one but where it is of a moral or social character of imperfect obligation. Such communication when spoken in actual malice is not privileged.
2. ———: ———: ———: **Malice.** In an action for slander the circumstances under which the words were spoken were *held* not to bring them under the term of absolute privileged communication, but were privileged only if spoken in good faith and from a sense of duty, and if they were spoken in actual malice the communications were not privileged.

Rose v. Tholborn.

3. ———: **Evidence: Admitting Slanderous Words Not Alleged.** Ordinarily slanderous words, other than the words charged in the petition to have been intended, are properly admitted as evidence of malice on the part of the defendant.
4. **EVIDENCE: Reputation: Specific Acts of Immorality.** It is not permissible to attack the reputation or character of a party by undertaking to show specific acts of immorality.
5. **JURY: Misconduct: Talking to Witness: New Trial.** One of the grounds assigned in the motion for a new trial was the misconduct of a juror in talking to a witness while the trial was in progress. Both juror and witness made affidavits that the case was in no way mentioned in their conversation. The trial court overruled the motion for a new trial. *Held*, that there was no reason for the appellate court to interfere.

Appeal from Jasper Circuit Court.—*Hon. D. E. Blair*,
Judge.

AFFIRMED.

M. R. Lively for appellant.

(1) The proof must be equivalent to the charge alleged in the petition. Though the charge is substantially the same, yet if in different phraseology it will not support the action. *Yager v. Bruce*, 116 Mo. App. 473; *Burch v. Benton*, 26 Mo. 153; *Unterberger v. Scharff*, 51 Mo. App. 102; *Berry v. Dryden*, 7 Mo. 324; *Burch v. Benton*, 21 Mo. 161; *Chrystal v. Craig*, 80 Mo. 375. (2) The court erred in permitting witness *McInturf*, offered by plaintiff, to testify that defendant said, "Is that woman rooming at your house? If, she is, you had better investigate her character," over the defendant's objection; and in permitting the jury to consider such statement in making up its verdict, over the defendant's objection. It was prejudicial to the defendant; not pleaded; was not in issue. *McAtee v. Vanlandingham*, 20 Mo. App. 45; *Kenworthy v. Journal Co.*, 117 Mo. App. 336; *Overton v. White*, 117 Mo. App. 537. (3) The court erred in submitting to the jury the charge in the petition "Post spent the night with Mrs.

Rose." There was no evidence to support it. *Kenworthy v. Journal Co.*, 117 Mo. App. 336. (4) The court erred in not giving the instruction the nature of a demurrer at the close of plaintiff's testimony asked by defendant. *Overton v. White*, 117 Mo. 557; *Ukman v. Record Co.*, 189 Mo. 378; *Townsend on Slander and Libel*, sec. 241; *Moberly v. Preston*, 8 Mo. 463; *Johnson v. Dispatch Co.*, 65 Mo. 463; *State v. Derry*, 20 Mo. App. 558. (5) The court erred in not permitting defendant to show by witness Taylor that the plaintiff was seen sitting on the lap of George F. Post in her room at the Smith Flats, under the pleadings in this case. *Yager v. Bruce*, 116 Mo. App. 473.

Clay & Davis for respondent.

(1) The court did not commit error in excluding evidence of specific acts of misconduct of plaintiff. *Yager v. Yager*, 116 Mo. App. 497; *Wright v. Kansas City*, 187 Mo. 693; *State v. Rogers*, 108 Mo. 204; *State v. Gesel*, 124 Mo. 535. (2) If the language used is slanderous the law in addition to presuming it to be false, also presumes that it was spoken maliciously. *Israel v. Israel*, 109 Mo. App. 373; *Buckley v. Knapp*, 48 Mo. 161; *Callahan v. Ingram*, 122 Mo. 369; *Hall v. Adkins*, 59 Mo. 144; *Mitchell v. Bradstreet Co.*, 166 Mo. 241. (3) The law does not require proof of general damages other than proof of the speaking of the language charged to have been spoken, if the language used imputes that the plaintiff is not chaste. *Hudson v. Garner*, 22 Mo. 423; *Hillebrand v. Dreinhoefer*, 13 Mo. App. 586; *Brown v. Wintsh*, 110 Mo. App. 274; *McCloskey v. Pulitzer Pub. Co.*, 152 Mo. 347. (4) In order for a communication to be privileged it must be made in good faith and without actual malice. *Newell's Slander and Libel* (3 Ed.), sec. 5, page 390, sec. 9, page 391; *Yeager v. Bruce*, 116 Mo. App. 483; *Minter v. Bradstreet Co.*, 174 Mo. 444.

COX, J.—Action for slander. Plaintiff recovered a verdict for actual damages in the sum of eight hundred dollars, and defendant has appealed.

The petition charged defendant with having made various slanderous statements relating to plaintiff's character, but only two were submitted to the jury, to-wit: That defendant, in a conversation with one George Post, used the following language in relation to plaintiff. "You spent the night with Mrs. Rose," and that defendant had, in a conversation with one Andy McInturff, used the following language in relation to plaintiff: "Post spent the night with Mrs. Rose, and Mrs. Smith said she would make an affidavit to it." Defendant filed an answer in which he had admitted making both of these statements, but justified on the ground that they were privileged communications. During the trial defendant was permitted to amend his answer by striking out that part in which he had admitted making the statement to Post. After having withdrawn this part of his answer the plaintiff offered the withdrawn portion in evidence before the jury as an admission on the part of defendant.

Defendant, in his motion for new trial, assigned twenty-four errors committed by the trial court, all of which we cannot notice in detail, but will consider only those which we deem material as appears from the record in this case.

The petition alleged that defendant meant by the language used to charge her with having had illicit sexual intercourse with one George Post. When the case went to the jury defendant was in the position of having admitted using the language the petition charged he had used in the presence of witness McInturff, and his only defense to it was that under the circumstances the communication was privileged.

Privileged communications are of two characters—absolute and qualified. A qualified privilege extends to all communications made bona fide upon any subject-

matter in which the party communicating has an interest, or in reference to which he owes a duty to a person having a corresponding interest or duty; and to cases where the duty is not a legal one but where it is of a moral or social character of imperfect obligation. [Finley v. Steele, 159 Mo. 299, 60 S. W. 108; Holmes v. Royal Fraternal Union, 222 Mo. 556, 568, 121 S. W. 100.] If the communication was privileged in this case at all it was only a qualified privilege. Defendant, in order to bring himself within the rule applied to a qualified privileged communication, testified that he was postmaster at Webb City and that Post came to Webb City a stranger to clerk in the postoffice, and was desirous of finding a place to room, and in order to accommodate him, defendant had taken him to witness McInturff's and introduced him to McInturff and recommended him as being a proper person to whom McInturff might let a room, and that Post was a gentleman and would be a proper person for McInturff to permit to associate with his family. That while Post was occupying a room at McInturff's home defendant had been informed by Mrs. Smith, who kept a rooming house in the city, and in whose house the plaintiff had roomed, that Post had spent the night with the plaintiff in her room in the rooming house of Mrs. Smith, and that he thought it was his duty to inform McInturff how Post was conducting himself by reason of the fact that he had been instrumental in Post securing a room at the home of McInturff, and in discharge of that duty he had made the statement to McInturff which the petition charged that he did make.

Defendant contends that under this testimony it was the duty of the court to instruct the jury that if they should believe from the evidence that defendant made the statements charged under such circumstances that it was a privileged communication, and the issues should be found for defendant. The court did not give the instruction as asked but did give it as asked except

that it added to it the following: "Unless you find that defendant spoke such words with actual malice," and defendant now contends that the addition of these words constituted error. We do not think so. If the words spoken were spoken under the circumstances detailed in the instruction, and as above indicated, they were privileged, provided they were spoken in good faith and under a sense of duty which defendant felt that he owed to McInturff to give him information in relation to the conduct of Post; but it was not an absolute privileged communication, and was only a privileged communication if spoken in good faith and from a sense of duty, and if it was spoken with actual malice it was not a privileged communication. Even though circumstances may exist which would justify a person in making a statement to another which would rob it of its slanderous character which it would otherwise possess, yet if the party making these statements does not make it from a sense of duty and in good faith but makes it from a malicious motive and from a feeling of personal ill will, or with a desire to injure the person about whom the language is used, then the rule that the communication was privileged cannot apply, and defendant must be held liable for his language. [Finley v. Steele, 159 Mo. 299, 60 S. W. 108; Minter v. Bradstreet Co., 174 Mo. 444, 73 S. W. 668; Holmes v. Royal Fraternal Union, 222 Mo. 556, 121 S. W. 100; Yager v. Bruce, 116 Mo. App. 473, 93 S. W. 307.]

The evidence discloses that Post went East upon a vacation and that while he was gone the plaintiff moved into the room formerly occupied by Post at the home of McInturff, and while McInturff was testifying as a witness he was permitted to testify that defendant at one time in a conversation with him used the following language in relation to plaintiff: "Is that Rose woman rooming at your house?" If she is you had better investigate her character." It is contended by defendant that the admission of this testimony was error for

the reason that plaintiff did not charge in her petition that defendant had used this language in relation to her. It is true the petition does not charge the use of this language, but that does not render it inadmissible. It was admissible as tending to show express or actual malice on the part of defendant toward the plaintiff.

Defendant offered to show by witnesses that the plaintiff had been seen sitting on the lap of Post in her room. Upon objection of plaintiff this testimony was excluded, and defendant now insists that error was committed in that respect. It was not permissible for defendant to attack the reputation or character of plaintiff by undertaking to show specific acts of immorality, and the court rightly excluded the offered testimony. [Yager v. Bruce, 116 Mo. App. 473, 93 S. W. 307; Shaefer v. The Railroad, 98 Mo. App. 445, 454, 72 S. W. 154; State v. Gesell, 124 Mo. 531, 27 S. W. 1101; Wright v. Kansas City, 187 Mo. 678, 693, 86 S. W. 452.]

Defendant's counsel contends in his brief that the court erred in submitting to the jury the charge in the petition that defendant had said of the plaintiff "Post spent the night with Mrs. Rose," on the ground that there was no evidence that defendant used this language. Why this contention should be made we are at a loss to understand for defendant expressly admitted in the answer that he did make that statement, and besides, McInturff testified that defendant did use that language concerning the plaintiff.

Defendant objected to all the instructions given on behalf of plaintiff and excepted to the refusal of all asked by defendant which were not given. The instructions are too numerous and too voluminous to discuss in detail, but in a general way they properly defined to the jury what is a privileged communication as applied to this case, and told the jury that if defendant used the language charged against him in good faith and under a sense of duty which he felt that he owed

to the party to whom he was making the statement, then the statement was privileged, and the issues should be found for defendant; but if he did not make the statement under a sense of duty, but made it with actual malice then the communication was not privileged, and if the jury should believe that the language used was calculated to and did convey to the minds of his hearers the meaning that defendant was charging plaintiff with having had illicit sexual intercourse with one Post, then the issues should be found for plaintiff. As applied to the testimony in this case this was a correct declaration of the law; the evidence warranted it, the jury has found for plaintiff and their verdict is binding upon us.

Defendant also contends that the verdict should have been set aside by reason of the conduct of one member of the jury. It appears from the affidavits filed in support of a motion for a new trial that the case was closed and was ready to submit to the jury at about ten o'clock p. m. and that one of the jurors, after being released for the night, walked home with a lady who had been subpoenaed as a witness for plaintiff and who was a friend of the plaintiff. That the juror and the witness had been seen in a whispered conversation before leaving the court house. Affidavits were also filed sworn to by the juror and the lady whom he had accompanied home in which they both stated that the case was in no way mentioned during their conversation. The court having overruled the motion for new trial must have been satisfied from these affidavits that nothing improper occurred and that the juror was in no way influenced by his association with this woman. We see no reason for interfering with the judgment of the court on that question. The judgment will be affirmed. All concur.

STATE ex rel. JOHN SMITH and MELVIN SHERMAN, Appellants, v. C. W. DYKEMAN et al., Respondents.

Springfield Court of Appeals, February 6, 1911.

1. **CERTIORARI: Purpose of Writ: Jurisdiction.** The office of the writ of certiorari is to give relief to an injured party when the court or body charged to have acted to his injury has proceeded without jurisdiction, or has exceeded its jurisdiction, or has rendered a judgment or made an order which it was not authorized by law to make.
2. ———: ———: **Appeal and Error.** A writ of certiorari cannot be used as a substitute for appeal or writ of error.
3. **DRAMSHOPS: Revoking License: Authority of County Court: Certiorari.** A county court revoked the dramshop license of relators for keeping a disorderly house in violation of section 3012, Revised Statutes 1899. This order was sought to be revoked by certiorari proceedings in the circuit court and upon falling these relators appealed to the appellate court. *Held*, that on such appeal only the certified record could be examined and it appearing by a fair construction thereof that the county court acted within its authority in revoking the license the order must stand.
4. ———: ———: **Disorderly House: Selling Liquor on Sunday.** Selling liquor on Sunday on one occasion is not, standing alone, sufficient to authorize a county court to revoke a dramshop keeper's license on the grounds that he kept a disorderly house.
5. ———: ———: ———: **Bawdy House Above Dramshop.** Where dramshop keepers rented the room above their saloon to be used as a bawdy house, and said room was connected with the saloon by a dumb waiter for conveying liquor to the inmates and frequenters of the house, *held*, that the county court was justified in finding that the dramshop keepers were guilty of keeping a disorderly house in violation of section 3012, Revised Statutes 1899.
6. **LICENSES: Dramshop License: Not a Contract: Police Power.** A license to sell liquor is in no sense a contract with the state, but a mere permit to do an act that would otherwise be unlawful and is subject at all times to the police power of the state.

State ex rel. v. Dykeman.

7. **WORDS AND PHRASES: "Disorderly House:" Bawdy House.** To constitute a disorderly house there must be a continuation of the acts for a short time at least, and such acts must tend to promote disturbances or breaches of the peace or violation of the law or must promote immorality. A bawdy house is a disorderly house per se and its maintenance is forbidden by statute.
8. **COUNTY COURT: Jurisdiction: Revoking Dramshop License: General Finding: Certiorari.** In a proceeding before a county court to revoke a dramshop keeper's license on the grounds that he conducted a disorderly house, a general finding that he conducted a disorderly house is sufficient, and where the specific findings upon which it is based are set out in the record of the county court and such specific findings are not inconsistent with the general finding, the general finding will not be disturbed in a certiorari proceeding.

Appeal from Jasper Circuit Court.—*Hon. David E. Blair, Judge.*

AFFIRMED.

Clay & Davis for appellants.

(1) Certiorari is the only remedy available for reviewing the action of the County Court in revoking the dramshop license of relators. State ex rel. v. Lichta, 130 Mo. App. 284; State ex rel. v. Smith, 176 Mo. 90; State v. Kirk, 112 Mo. App. 447. (2) The acts complained of by petitioner and found by the county court to be true, did not constitute the dramshop of relators a disorderly house. 2 McClain Criminal Law, sec. 1137; Wharton Criminal Law (9 Ed.), sec. 1449; 1 Bishop Criminal Law (8 Ed.), sec. 1106; Commonwealth v. Besser, 30 S. W. 1012; Hawkins v. Lutton, 95 Wis. 492, 60 Am. St. Rep. 131; Price v. State, 96 Ala. 1, 11 So. Rep. 128, 7 Atl. 340.

Byron H. Coon and *W. N. Andrews* for respondents.

COX, J.—Relators were licensed dramshop keepers in the city of Joplin, and on July 19, 1910, the county court, after a hearing upon a complaint filed by Guy T. Humes, mayor of the city of Joplin, revoked the dramshop license of relators. The relators then proceeded by certiorari in the circuit court for the purpose of having the orders of the county court revoking their license quashed and set aside. The circuit court refused to quash the proceedings of the county court and the relators have appealed to this court.

The office of a writ of certiorari is to give relief to an injured party when the court, or a body charged to have acted to his injury, has proceeded without jurisdiction, or has exceeded its jurisdiction, or has rendered a judgment, or made an order which it was not authorized by law to make, but this writ cannot be used as a substitute for appeal, or writ of error. [State ex rel. v. Reynolds, 190 Mo. 578, 588, 89 S. W. 877, and cases there cited.] It, therefore, follows that we can only examine the records certified to us, and if, by a fair construction thereof, it shall appear that the county court acted within its authority in revoking the license of relators in this case their order must stand, and if not, it must fall.

A license to sell liquor is in no sense a contract with the state, but is a mere permit to do an act that would otherwise be unlawful, and is subject at all times to the police powers of the state government. The party receiving such a license takes it subject to all the provisions of the law relating thereto, and knows when he secures the license that it may be revoked at any time for the cause mentioned in the statute. The power to revoke in this case is lodged with the county court, and the statute, merely provides that if the licensee shall not at all times keep an orderly house the coun-

ty court may, upon the application of any person, revoke the license. No form of procedure is provided except that five days' notice of the hearing must be given the accused. In the hearing the county court merely conducts an investigation for the purpose of satisfying their own judgment as to whether or not the licensee has kept a disorderly house and are in no sense conducting a judicial trial. [Higgins v. Talty, 157 Mo. 280, 57 S. W. 724.] The proceedings, therefore, are not required to be as formal and exact as would be the case in a judicial trial involving interference with life, liberty, or property. [Barnett v. County Court, 111 Mo. App. 688, 703, 86 S. W. 575.] All that is required is that the record shall show that the court acted within its authority. Whether the county court did so act in this case must depend upon whether or not the facts found by the court, by a fair construction, show that relators kept a disorderly house.

The record recites that relators were served with notice five days before the hearing, but neither appeared. The court heard the testimony and made the following finding:

"1st. That the said John Smith and Melvin Sherman have violated the law in selling intoxicating liquors on the first day of the week, commonly called Sunday, to-wit, the . . . day of June, 1910."

"2d. That said dramshop operated by John Smith and Melvin Sherman was connected and has been for a long period of time by a dumb waiter running from the dramshop on the first floor to the second floor of said building, and that said dumb waiter is and was used for the purpose of sending up intoxicating drinks of all characters to the inmates and visitors in said rooms above said dramshop."

"3d. That said John Smith and Melvin Sherman have been and are renting the second floor of the said building in which said dramshop is located to Ray Sheldon for the purpose of operating and conducting therein

a house of prostitution, and that the same woman is living above said saloon now that has lived there for the past several months, and that the reputation of said woman for virtue and chastity is bad; and that there are several women who live and occupy rooms on the said second floor at this date and have lived there for a long period of time and that divers men congregate in said rooms above said saloon and that whiskey and beer are sent up into said rooms with the knowledge and consent of the said John Smith and Melvin Sherman by the use of the said dumb waiter."

"And it appearing to the court that in all things said, the matter having been fully considered, the said John Smith and Melvin Sherman have been guilty of violating section 3012, Revised Statutes of Missouri of 1899."

Following this finding is the order revoking the license.

The fact that relators had on one occasion violated the law by selling liquor on Sunday is not shown to have any connection with the other facts found, and it may, therefore, be eliminated, as it, standing alone, is not sufficient. [State ex rel. v. Lichta, 130 Mo. App. 284, 109 S. W. 825.] The other facts found are all connected and must be considered together. Do they show that relators kept a disorderly house?

Our statute does not define a disorderly house and we must, therefore, look to the common law for a definition of the term. It has been variously defined. Wharton defines it to be a house kept in such a way as to disturb, annoy or scandalize the public generally, or the inhabitants of a particular vicinity, or the passers in a particular highway. This definition is quoted approvingly in State ex rel. v. Lichta, 130 Mo. App. 284, 109 S. W. 825, and in Hawkins v. Luttton (Wis.), 70 N. W. 483. In Price v. State (Ala.), 11 So. 128, the court, in defining the offense of keeping a disorderly house, says, "It is enough that the acts done

at such house are of the character charged and contrary to law and subversive of public morals." In *Thatcher v. State* (Ark.), 2 So. 343, this language is used. "A disturbance of the peace is not necessary. A house may be disorderly because it draws together idle, vicious, dissolute or immoral persons who engage in unlawful or immoral practices, thereby endangering the public peace and promoting immorality. It has been said that "if the doors of a house are practically open to the public, alluring the young and unwary into it to indulge in or witness anything corrupting to their virtue or general good morals, the keeper cannot excuse himself by alleging that the public are not disturbed." Citing 1 Bishop's Criminal Law, 6th Edition, sections 1107 to 1120, and Wharton's Criminal Law, 9th Edition, sections 1449 to 1456; *State v. Williams*, 30 N. J. Law 104; *Commonwealth v. Cobb*, 120 Mass. 356. In *Commonwealth v. Bessler* (Ky.), 30 S. W. 1012 this language is used. "The offense of keeping a disorderly house consists of a repetition of improper conduct." In *Commonwealth v. Goodall* (Mass.), 43 N. E. 520 it is said, "The common law offense of keeping a disorderly house may be proved in various ways—by showing that the accused kept a common bawdy house, a common gambling house, or a disorderly place of entertainment."

It will be seen at once that it would be very difficult to frame a definition of the term "disorderly house" that would fit the facts in every case, but there are some elements that seem to be essential in all cases. One is that a single act is not enough, but there must be a continuation of the acts for a short time at least. Another is that the continued acts must either create some disturbance or must tend to promote disturbances or breaches of the peace, or violations of the law, or must promote immorality. Applying these tests to the case at bar what have we? Relators are operating a

saloon in a two-story building of which they have entire control. The room immediately over the saloon is rented by them to another party for the purpose of having a bawdy house conducted therein, and they then provide or maintain an elevator or "dumb waiter" that is used for the purpose of conveying liquor from the saloon to the inmates and frequenters of the bawdy house above. The bawdy house was a disorderly house *per se*, and its maintenance forbidden by our statute. The relators, by renting the room over their saloon to be used as a house of prostitution, were *particeps criminis* in maintaining it. [State v. McClain, 92 Mo. App. 456; Coon v. State (Ala.), 20 So. 380; State v. Engeman (N. J.), 23 Atl. 676; Commonwealth v. Cobb, 120 Mass. 356.] In legal contemplation, therefore, and for the purposes of the investigation conducted by the county court in this case, the relators' position is the same as if they had run the house of prostitution themselves.

If the saloon and the bawdy house operated in conjunction so that either assisted the other they should both be considered as parts of a general business, and though one be located on the first floor and the other on the second floor they should both be regarded as parts of the same house, and what transpired in both the upper and lower rooms should be considered in determining the character of the house kept in either room. [State v. Lee (Iowa), 45 N. W. 545.]

It is a matter of common knowledge that frequenters of a bawdy house are usually patrons of saloons also, and when these relators established a bawdy house over their saloon and maintained an elevator for the purpose of conveying liquor from the saloon to the inmates and frequenters of the bawdy house above, it is but fair to assume that their purpose in locating the bawdy house in such close proximity to the saloon and connecting the two as they did was to increase the sales from the saloon, and this necessarily made the relators

interested in the patronage of the bawdy house as they were interested in the patronage of the saloon; hence, the bawdy house became an adjunct of the saloon and the fact that the two had been maintained in this way for several months by relators would cause the saloon as well as the bawdy house to become a public scandal and a continual promoter of immorality, and is thus brought within the common law definition of a disorderly house. The inference that the place, including the saloon, had become notoriously offensive gained some strength from the fact that the mayor of the city filed the complaint against the relators in this case.

The court, in its finding, does not set out specifically that the saloon had become a public scandal, but the facts which it did find show that such must have been a necessary result, and these specific findings are followed by a general one that relators had violated section, 3012, Revised Statutes 1899, which statute makes it unlawful for a dramshop keeper to keep a disorderly house. It was not necessary that the court should have made any specific finding of facts. A general finding that relators were conducting a disorderly house would have been sufficient, and since this general finding was made it must stand unless the specific findings upon which it is based contradict it, or are insufficient to support it. In our judgment the specific findings in this case support the general one and the record is sufficient to show the authority of the county court to make the order revoking relators' license, and the trial court rightly so held. The judgment will be affirmed. All concur.

NANNIE McNEIL, Respondent, v. CITY OF CAPE GIRARDEAU, Appellant.

Springfield Court of Appeals, February 6, 1911.

1. **INSTRUCTIONS: Personal Injuries: Damages: Impairment of Earning and Labor Capacity: Evidence.** In a suit for damages for personal injuries, plaintiff was a married woman and the evidence did not show that prior to the injury plaintiff had been earning anything. *Held*, that it was improper to instruct the jury that in estimating her damages they should assess a reasonable compensation for any permanent impairment of plaintiff's earning capacity. *Held further*, that it was proper to instruct the jury they might take into consideration the impairment of plaintiff's capacity to perform labor.
2. **PERSONAL INJURIES: Damages: Impairment of Earning and Labor Capacity: Evidence.** In order to permit the jury to consider as an element of damages in a personal injury suit, the impairment of plaintiff's capacity to perform labor, it is not necessary to offer proof of what the injured party's earnings were at the time of the injury, but there is a distinction between capacity to perform labor and earning capacity. To recover for loss of earning capacity there must be evidence tending to show the injured party's earnings prior to the injury and to what extent it had been impaired.
3. **EVIDENCE: Negligence: Defective Sidewalks: Evidence of Condition.** In a suit for damages against a city for injury received by plaintiff in falling over a loose board in a sidewalk, *held*, that in showing the condition of the sidewalk at place of the injury plaintiff should not be restricted to the particular board, yet the testimony should be restricted to the condition of the walk in the immediate vicinity of the injury, and that it was error to admit evidence showing the condition of the walk along the entire block.
4. ———: ———: ———: **Evidence of Other Accidents.** In a suit for damages for personal injuries received by plaintiff in tripping over a loose board in a sidewalk, although it is competent for witnesses to testify as to the condition of the walk at or near the place of the injury, and to permit them to state that the boards had tipped up when they were passing over the walk, as tending to explain how they knew the boards were loose, yet it was error and prejudicial to defendant's case to permit them to testify that in passing over this walk they had tripped on the loose boards and fallen by reason thereof.

Appeal from Cape Girardeau Court of Common Pleas.
—*Hon. Robert G. Ranney, Judge.*

REVERSED AND REMANDED.

Frank Kelly for appellant.

(1) The court erred in admitting incompetent testimony concerning the sidewalk. *Smart v. Kansas City*, 91 Mo. 594; *Stout v. Columbia*, 118 Mo. App. 444; *Calcaterra v. Iovaldi*, 123 Mo. App. 347; *Goble v. Kansas City*, 148 Mo. 470. (2) To submit an instruction not supported by evidence is error and if damages are asked for loss of earning or profits, evidence as to its value must be submitted. *Duke v. Railroad*, 99 Mo. 347; *Slaughter v. Railroad*, 116 Mo. 274; *O'Brien v. Loomis*, 43 Mo. App. 29; *Mammemberg v. Railway*, 62 Mo. App. 568; *Stoetzle v. Swearinger*, 96 Mo. App. 592.

A. P. Stewart and *John J. O'Connor* for respondent.

(1) The defendant is liable in damages for plaintiff's injuries. *Norton v. St. Louis*, 97 Mo. 537; *Bierman v. St. Louis*, 120 Mo. 457; *Banstian v. St. Louis*, 152 Mo. 325; *Weithaupt v. St. Louis*, 158 Mo. 655; *Coffey v. Carthage*, 186 Mo. 582; *Benton v. St. Louis*, 217 Mo. 700; *Beaudeau v. Cape Girardeau*, 71 Mo. 395. (2) Defendant denied knowledge of the unsafe condition of the sidewalk, which was less than 200 feet in length, hence the testimony of Mrs. Kidean and Mr. Crawford, witnesses for plaintiff, that they tripped over loose boards in the sidewalk at different points near where the plaintiff fell, a month or more prior to the happening of plaintiff's injury, was competent to show that the sidewalk was in such an unsafe condition so long and continuously prior to her fall as to impart notice of its condition to defendant prior to the happening

of plaintiff's injury. *Busher v. Aurora*, 71 Mo. App. 423; *Huff v. Marshall*, 97 Mo. App. 542; *Marler v. Springfield*, 65 Mo. App. 301; *Norton v. Kramer*, 180 Mo. 536; *Neff v. City of Cameron*, 213 Mo. 353; *Wright v. Kansas City*, 187 Mo. 679. (3) The loss of power to labor is a distinct loss, for which damages may be recovered, even though the loser never used said power. In other words the loss of power to earn through the performances of labor is a distinct element of damage separate and apart from the loss of earnings. *Perrigo v. St. Louis*, 185 Mo. 290; *Cullar v. Railroad*, 84 Mo. App. 346; *Jordan v. Railroad*, 138 Mass. 425; *Railroad v. Jacobs*, 88 Ga. 652; *Powell v. Railroad*, 77 Ga. 200.

COX, J.—Action for damages caused by a fall upon the sidewalk on the east side of Lorimer street in defendant city. Judgment for plaintiff for two thousand dollars, and defendant has appealed.

The allegation of the petition is that plaintiff was tripped and caused to fall by a loose board in the walk as a result of which her left arm was broken, and alleged damages resulting from said injuries as follows:

"She has suffered great pain of body and anguish of mind and will continue to suffer pain in the future, and that the fracture of the bones of her said left arm has caused said arm to be permanently disfigured and injured, which has greatly and permanently impaired and lessened her capacity to perform labor, and thereby will permanently impair her earning capacity, and cause her to suffer great personal inconvenience, all to her great damage in the sum of ten thousand dollars".

The evidence on the part of plaintiff discloses that the plaintiff and her husband were walking upon the sidewalk on the east side of Lorimer street in the city of Cape Girardeau, and that when some distance south of Independence street her husband stepped upon a loose board in the sidewalk, when the board tilted, she

tripped upon it, fell and broke her arm. The evidence also tended to show that the walk had been out of repair for from six weeks to two months, and it is conceded in this court that the plaintiff made a *prima facie* case but it is insisted that error was committed in the giving of instructions and in the admission of testimony. .

The instruction complained of was one relating to the measure of damages in which the jury are told that in estimating plaintiff's damages they should assess, together with other elements of damages, the following:

"A reasonable compensation for any permanent impairment of her earning capacity or capacity to perform labor through her said injury to her said arm."

There was no evidence to show that plaintiff was at the time of the injury, or prior thereto had been, earning anything. There was no evidence that she was engaged in any kind of employment. The only testimony relating to that matter shows that she and her husband were boarding and at the time she fell she was returning from the place where she was taking her meals to her home. It is now insisted by appellant that it was error to permit the jury to take into consideration impairment to plaintiff's earning capacity without having first proven what her earning capacity was. It will be noticed that the quotation from the instruction above given couples together the earning capacity and the capacity to perform labor. It was entirely proper to tell the jury that they might take into consideration, in estimating the damages of plaintiff, any impairment of her capacity to perform labor. To impair one's ability to perform labor is an injury to personal right, and by reason of that fact, is a proper element of damages whether the ability to perform labor is being used by the injured party or not. Hence, in order to permit the jury to consider this as an element of damages it is not necessary to offer proof of what the injured party's earnings were at the time. [Perrigo v. St. Louis, 185 Mo. 274, 84 S. W. 30; Culler v. The Railroad, 84 Mo. App.

340; *McRae v. Metropolitan Street Ry. Co.*, 125 Mo. App. 562, 102 S. W. 1032.]

An impairment of earning capacity, however, is a very different thing and stands upon an entirely different basis. The capacity to perform labor and earning capacity are not one and the same thing. A person's physical ability to perform labor might be entirely destroyed without his earning capacity being to any extent lessened. The earning capacity of a man depends upon the business in which he is engaged or the salary which may be paid him, and to permit the submission of loss of earning capacity to the jury as an element of damages there must be testimony to show what the earning capacity of the injured party was, and to what extent it has been impaired by the injury received. [*Davidson v. The Transit Co.*, 211 Mo. 320, 109 S. W. 583; *Slaughter v. Metropolitan St. Ry. Co.*, 116 Mo. 269, 23 S. W. 760; *O'Brien v. Loomis*, 43 Mo. App. 29; *Stoetzle v. Sweringen*, 96 Mo. App. 592, 70 S. W. 911; *Boyce v. C. & A. Ry. Co.*, 120 Mo. App. 168, 96 S. W. 670; *Grout v. Central Electric Ry.*, 121 S. W. 891.]

The instruction, therefore, in so far as it permitted the jury to take into consideration impairment of plaintiff's earning capacity was erroneous by reason of the fact that there was no testimony upon which to base it.

It is contended that error was committed in the admission of testimony. Witnesses were permitted to testify on behalf of plaintiff as to the condition of the walk along the east side of Lorimer street all the way between Independence and Meriwether streets—a distance of one block. Plaintiff, in her testimony, located the place of the injury a short distance south of Independence street. To show the condition of the walk at the place of the injury the plaintiff should not be restricted to the particular board which caused her to fall, but the testimony should have been restricted to

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the condition of the walk in the immediate vicinity of the injury, and we think that to show the condition of the walk along the entire block was extending the limit too far. Witnesses were also permitted to testify that in passing over this walk they had tripped on loose boards and some of them had fallen by reason thereof. We think this erroneous as tending to prejudice the jury against the defendant. It was competent for witnesses to testify as to the condition of the walk at or near the place of the injury, and in explaining how they knew it to have been out of condition we think it proper to have permitted them to state that the boards had tipped up when they were passing over the walk for that might be the means of their knowledge that the boards were loose, but there is no reason why they should be permitted to say that they had fallen by reason of the loose boards. Such testimony could not assist plaintiff's case and might prejudice defendant's case, and, therefore, should have been excluded.

For the errors noted the judgment will be reversed and the cause remanded. All concur.

**MAUD E. WITTY, Respondent, v. SPRINGFIELD
TRACTION COMPANY, Appellant.**

Springfield Court of Appeals, February 6, 1911.

1. **EVIDENCE: Damages.** Where it had been agreed that a suit against a street railway company for damages for personal injuries should abide the decision of the Court of Appeals in a similar case pending in the appellate court on the question of the company's liability, it was not error to read such stipulation and the mandate of the appellate court to the jury, where neither showed the amount of the judgment in the case decided by the Court of Appeals, and the only question before the jury being the amount of damages plaintiff was entitled to recover.

2. ———: **Expert Testimony: Hypothetical Questions: Personal Injuries.** A hypothetical question propounded to a physician, testifying as an expert, submitted the inquiry of the effect upon a woman passenger resulting from being thrown out of a seat in a street car with force and violence, alighting upon the floor and striking the lower end of her spine. *Held* proper and not subject to the objections that it was not based upon the facts proven, nor sufficiently broad so that an opinion could be predicated upon it.
3. ———: **Expert Evidence: Personal Injuries.** A physician may testify as to the probable results of a described injury or may detail the causes which might produce a certain described condition.
4. **WITNESSES: Expert Witness: Evidence Tending to Discredit.** It is proper, on cross-examination, to show that defendant's expert witness, a physician, has been for a long time sustaining to other corporations or parties a relation similar to the one he sustained toward defendant at the time of his testimony.
5. **DAMAGES: Personal Injuries: Verdict Not Excessive.** A verdict for \$1500 was *held* not excessive where it awarded to plaintiff, a woman, who sustained injuries while a passenger on a street car, which resulted in slight paralysis of the bowels and injury to the stomach, so that she could not properly digest her food, and also caused constant pain and a nervous condition.

Appeal from Greene Circuit Court.—*Hon. James T. Neville*, Judge.

AFFIRMED.

Delaney & Delaney for appellant.

Leonard Walker and *Frank B. Williams* for respondent.

(1) When the judgment is manifestly for the right party it will not be reversed. R. S. 1899, sec. 865; R. S. 1909, sec. 2082; *Orth v. Dorschlein*, 32 Mo. 366; *Hunter v. Miller*, 36 Mo. 143; *Miller v. Newman*, 41 Mo. 509; *Nelson v. Foster*, 66 Mo. 381; *Fairbanks v. Long*, 91 Mo. 628; *Fitzgerald v. Barker*, 96 Mo. 661; *Bushey v. Glen*, 107 Mo. 331; *Henry v. Railway Co.*, 113 Mo. 525;

Burns v. Liberty, 131 Mo. 372. (2) If there is conflicting evidence in an action at law and the issues are correctly submitted, the verdict ends the controversy. Goye v. Kansas City, 75 Mo. 672; Price v. Chamberlain, 82 Mo. 618; State v. Hart, 89 Mo. 590; Eswin v. Railway, 96 Mo. 290; Donovan v. Ryan, 35 Mo. App. 160; Williams v. Railway, 109 Mo. 470; Burnstein v. Railway, 56 Mo. App. 45; Funnell v. Gooch, 59 Mo. App. 309. (3) A judgment at law will not be reversed unless the record shows that the trial court was called upon to decide some question of law and that its decision thereon is wrong. VonPul v. St. Louis, 9 Mo. 49; Vaughn v. Bank, 9 Mo. 379; Clark v. Stevens, 10 Mo. 510; Clamorgan v. Railway, 3 Mo. App. 574. (4) The hypothetical question propounded to the witness, Dr. Ruyle, was properly framed and was based on facts within the confines of the evidence. Riley v. Sparks, 52 Mo. App. 572; Benjamin v. Railway, 50 Mo. App. 602; Holloway v. Kansas City, 184 Mo. 19. (5) It was competent to show that appellant's witness had, from the beginning of his professional career, been employed or connected with concerns whether corporations or not, having many personal injuries cases. Czezwszka v. Railway, 121 Mo. 201; State v. Prewitt, 144 Mo. 92.

COX, J.—Action for damages for an injury resulting to plaintiff from a collision of defendant's street car with an iron electric tower in the center of the square in the city of Springfield. As a result of this collision plaintiff alleges that she was thrown from her seat and was seriously injured, having received a serious blow in the back, another in the region of the abdomen, another in the region of the lower end of the spine, as a result of which she had become impaired in health, her nervous system was shocked, and she had become an invalid and would remain so during her life. Trial by jury and verdict for plaintiff for fifteen hundred dollars, and defendant has appealed.

This is a companion case to the case of *Wolven v. Springfield Traction Co.*, 143 Mo. App. 643, and after the trial of the *Wolven* case the attorneys in this case filed a stipulation that this case should abide the decision in the *Wolven* case which had been appealed and if the judgment in that case should be affirmed, then the only question that should be tried in this case would be the question of damages. The *Wolven* case was affirmed, and thereafter this case was called for trial, and at the trial this stipulation and also the mandate of the Court of Appeals showing the affirmance of the judgment in the *Wolven* case were offered in evidence over defendant's objection, and this is now assigned as error. It is contended that the reading of this stipulation and the mandate to the jury were prejudicial to defendant. We are unable to see how this could be so for defendant had already agreed that if the *Wolven* case was affirmed it would concede its liability in this case, and would try only the question of damages. Neither the stipulation nor the mandate read to the jury showed the amount of the judgment in the *Wolven* case, and it could not, therefore, prejudice the jury against the defendant on the question of the amount of damages which it should be required to pay the plaintiff in this case.

Dr. Ruyle had testified on behalf of plaintiff, and was asked the following question: "Doctor, a person thrown out of a seat in a street car with some force and violence, alighting on the lower end of the spine and striking that, or the buttocks against the floor of the car—A woman, a female person—what would be the effect upon a person so thrown out of the seat?" Objection was made to this question upon the ground that it assumes and places witness in both the roles of physician in waiting and expert at the same time, and because the question is not based upon the facts proved, the basis is not sufficiently broad upon which to predi-

cate an opinion. There is nothing in this question to show that to answer it the physician would be required to base this answer upon information secured while attending the patient and to commingle that with his judgment as an expert. Neither is the objection that it was not based upon the facts proven well taken for the plaintiff had previously testified that she had been thrown from the seat as indicated by the question. The latter part of the objection that the basis is not sufficiently broad upon which to predicate an opinion is not well taken. The plaintiff had described the manner of her fall, and had also stated that she had been in good health prior to the time of the injury; that she had suffered constantly since the injury and had been unable to defecate properly, being compelled to remove the fecal matter mechanically, and in answering the question, the doctor had stated that if the blows were severe they might produce concussion of the brain, a shake-up of the nervous system, possible paralysis of the lower parts, and might cause paralysis of the rectum and paralyze the sphincter muscle so as to destroy the power to expel the fecal matter. We see no objection to the question or its answer. A physician may testify as to the probable results of a described injury, or may detail the causes which might produce certain described conditions. [Holloway v. Kansas City, 184 Mo. 19, 39, 82, S. W. 89.]

Contention is also made by appellant that witnesses for plaintiff were allowed to detail her conversations and conduct long after the injury, and under circumstances which show that they could not have been part of the *res gestae*, or the natural expressions resulting from pain. A careful reading of the testimony fails to show that any testimony of this character was admitted over defendant's objection; hence, there could be no error in this respect.

Doctor Smith had testified as a witness on behalf of defendant, and on cross-examination, plaintiff's counsel was permitted to ask him if he had not occupied a similar relation to the Central Coal and Coke Company at Macon, Missouri, that he now occupied to the defendant, and defendant assigns the admission of this testimony on cross-examination as error. For the purpose of affecting the credibility of a witness it is always competent to show the feeling of the witness for or against a party litigant and his bias or prejudice if such there be. [State v. Darling, 202 Mo. 150, 100 S. W. 631; Czezewzka v. Railway, 121 Mo. 201, 25 S. W. 911; State v. Pruett, 144 Mo. 92, 45 S. W. 1114.] In this case the testimony of Dr. Smith was to some extent in conflict with that of Dr. Ruyle, who had testified on behalf of plaintiff, and we can see no reason why on cross-examination it was not permissible to show that Dr. Smith had been, for a long time, sustaining to other corporations or parties a relation similar to the relation he now sustains to defendant; especially should this be true where, as in this case, there is some conflict in the testimony of expert witnesses whose testimony is largely an expression of opinion, for it is common knowledge that any person is liable to be affected—often unconsciously—in his judgment by his personal interest, and the relation which he may sustain to the parties, and the fact that he may have sustained a similar relation to other parties and the time of its duration may very properly be considered for the same reason.

Contention is also made that the court erred in refusing certain instructions asked by the defendant. These instructions were for the purpose of withdrawing from the jury the consideration of the testimony elicited from Dr. Smith on cross-examination as to his former employment by another corporation, but what we have said in relation to the admission of that testimony disposes of the objection to these instructions.

It is finally contended that the damages assessed are excessive. We have gone carefully over the testimony with a view of ascertaining whether there is any force in this position. The evidence on the part of plaintiff shows that she was severely injured; that she had been in good health previous to the accident, and had had no trouble in digesting her food or in the movement of her bowels; that she had done her own house work, and was generally in good health; that since the accident she had constantly suffered pain, and as a result of the injury to the stomach she was unable to properly digest food, and by reason of the injury to the lower end of the spine, resulting in paralysis of the rectum, the fecal matter had since been required to be removed mechanically; that she had suffered pain constantly from the time of the injury and was still suffering; was nervous, and the evidence would also warrant the jury in finding that this condition was likely to continue indefinitely, and if the jury believed this testimony, we cannot say that the amount of the verdict—fifteen hundred dollars—was excessive. The judgment will be affirmed. All concur.

J. E. DAZEY, Appellant, v. F. A. LAURENCE,
Respondent.

Springfield Court of Appeals, February 6, 1911.

1. **PRACTICE: Parties: Interlocutory Judgment: Admitting New Defendants Before Final Judgment.** Plaintiff sued one of the defendants on account of breach of contract, and to have a lien declared on certain real estate. An interlocutory judgment was rendered against this defendant and the cause continued, when at a subsequent term respondent asked to be made a party to the suit for the reason that he had purchased the real estate in question in good faith and without actual knowledge of the pending suit. *Held*, that it was within the power of the trial court in the exercise of a wise discretion to permit respondent to come in and defend any time before final judgment.

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2. **LIS PENDENS: Purchaser Without Actual Knowledge: Equity: Adequate Legal Remedy.** Plaintiff sued on account of a breach of contract for the sale of livery stock, under which contract one of the defendants had agreed to secure part of the purchase price by a mortgage on certain real estate, and the suit was to establish a lien on said land. A *lis pendens* was filed at the institution of the suit. Respondent asked to be made a party defendant before final judgment, claiming to be a purchaser of the land in good faith, for value and without actual knowledge of plaintiff's claim. *Held*, that the filing of the *lis pendens* would preclude respondent from holding the land against plaintiff, if to do so would work injury to plaintiff, but the plaintiff must show himself entitled to equitable relief and if the defendant, who breached the contract was solvent and a money judgment could be collected by execution, so that plaintiff had an adequate remedy at law, plaintiff would not be entitled to the lien as against respondent.
3. **EQUITY. Specific Performance: Discretion of Court.** Specific performance of a contract is not awarded by a court of equity as a matter of right, but rests in the sound discretion of the court, and whether it will be granted or withheld in a given case must be determined by the facts of that case, and one of the requisites to the granting of such relief is the absence of an adequate remedy at law.
4. ———: **Adequate Legal Remedy: Burden of Proof.** In a suit in equity to have a lien declared on real estate, where plaintiff would not be entitled to the relief sought if he has an adequate remedy at law, the burden will be upon plaintiff to show that defendant was insolvent, so that a money judgment could not be collected on execution, when to grant the relief demanded would result in loss to the purchaser of the land in question who bought in good faith and without actual knowledge of plaintiff's claim.
5. **APPEAL AND ERROR: Calling Trial Court's Attention to Error.** In a suit for specific performance of a contract, or to have a lien declared on certain real estate, which had been purchased from defendant by another party during the pendency of the suit, the relief prayed for was denied and it did not appear that plaintiff had asked for a money judgment against defendant, nor that he had called the trial court's attention in his motion for a new trial, to the fact that he was entitled to a money judgment. *Held*, that he is not in a position to insist upon such judgment in the appellate court.

Appeal from Barton Circuit Court.—*Hon. B. G. Thurman*, Judge.

AFFIRMED.

Cole, Burnett & Moore for appellant.

(1) As disclosed by Laurence's application to be made a party defendant, plaintiff, upon bringing his suit, had filed in the office of the recorder of deeds, long prior to the deed from Elvin to Laurence, a notice of the pendency of his suit; this was in accordance with the statute, and Laurence took with notice of that contract with plaintiff. R. S. 1909, sec. 8211; *Rosenheim v. Hartsock*, 90 Mo. 364; *Turner v. Babb*, 60 Mo. 342; *O'Reilly v. Nicholson*, 45 Mo. 166; *Turner v. Edmonston*, 210 Mo. 420. (2) When a court of equity is once possessed of a cause it may do complete justice, even to rendering a money judgment. *Haven v. Bank*, 182 Mo. 345; *Harrison v. Craven*, 181 Mo. 602; *Lamont v. Egg Co.*, 109 Mo. App. 54. (3) Courts cannot, and ought not to, undertake to relieve parties from the consequences of their own negligence. *Robyn v. Pub. Co.*, 127 Mo. 390; *Boshyshell v. Summers*, 40 Mo. 172; *Weimer v. Morris*, 7 Mo. 6. (4) It is an established rule of practice in this state that in order to justify a trial court in setting aside a judgment by default, the defendant must show (1) that he has good reason for the default, and (2) that he has a meritorious defense. *Hoffman v. Loudon*, 96 Mo. App. 192; *Harkness v. Jarvis*, 182 Mo. 231; *Colter v. Luke*, 129 Mo. App. 707; *Dye v. Bowling*, 82 Mo. App. 591. (5) In absence of fraud, etc., courts specifically enforce contracts. And while specific performance is not decreed as a matter of course, yet the refusal must not be arbitrary or capricious. *Kilpatrick v. Wiley*, 197 Mo. 172; *Evans v. Evans*, 196 Mo. 23; *Brevator v. Creech*, 186 Mo. 572.

Thos. J. Smith for respondent.

(1) An interlocutory judgment or decree, made in the progress of a cause is always under control of the

court until the final decision of the suit, and it may be modified or rescinded upon sufficient grounds shown, at any time before final judgment, though it be after the term in which the interlocutory sentence was given. 1 Black on Judgments, sec. 308; R. S. 1909, sec. 2094; Smith v. Scott, 133 Mo. 623; Sinclair v. Lead & Zinc Co., 87 Mo. App. 274. (2) The contract sued on in this case is unilateral in its terms, and because there was no undertaking therein by the defendant Frank Elvin to do anything it was not enforceable against him. Richardson v. Hardwick, 106 U. S. 252; Stitt v. Heirdekoper, 17 Wall. 385; Robinson v. Mining Co., 5 L. R. A. 773; Gustin v. School Dist., 54 N. W. 156; Phoenix Ins. Co. v. Kerr, 129 Fed. 723. (3) The plaintiff, in order to recover as for a specific performance, must not only show his ability and willingness to specifically perform the contract himself, but must tender such performance. Mastin v. Halley, 61 Mo. 202. (4) The appellant is in no attitude to allege as error here the failure of the court below to render a personal judgment for damages in his favor and against the defendant Frank Elvin, even if it had been warranted under the petition, for the reason no such error was specifically called to the attention of the court below in the motion for a new trial. Sweet v. Maupin, 65 Mo. 65; Bollinger v. Carrier, 79 Mo. 318; Hamman v. Coal Co., 156 Mo. 232; Cook v. Clary, 48 Mo. App. 166; Lynch v. Railroad, 208 Mo. 44.

COX, J.—The essential facts out of which this litigation grew are as follows:

On December 23, 1907, the following contract was entered into between plaintiff and defendant, Frank Elvin.

“FINDLEY, ILLINOIS, December 23, 1907.

“I have this day sold to Frank Elvin my livery stock in Pontiac, Ill., for the sum of six thousand dol-

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lars to be paid in the following manner—\$500 cash, \$500 on or before April 1st, 1908, \$2000 in merchantable notes, \$3000 secured by mtge. on south half of Sec. 15, Ozark Tp., Barton Co., Mo., to run for a period of five years from Dec. 1st, 1907, int. at the rate of five per cent payable semi-annually. Said livery stock is to remain in possession of J. E. Dazey until deal is consummated.

“J. E. DAZEY,
“FRANK ELVIN.”

Defendant, Frank Elvin, refused to comply with this contract and conveyed the land mentioned therein to his brother, J. C. Elvin, and also executed some form of statement setting forth that one J. M. Harlow was the owner of a one-third interest in the land. The deed to J. C. Elvin, and the statement as to Harlow's interest, were filed for record in Barton county. On defendant Frank Elvin's refusal to comply with the contract upon his part, plaintiff sold the livery stock mentioned in the contract at public auction, from which sale he realized \$4559.35 for which he gave proper credit, then brought this suit alleging the facts above set out, and further alleging that the conveyances of the property were fraudulent, alleged the insolvency of Frank Elvin and prayed an accounting and a decree of specific performance requiring defendant, Frank Elvin, to execute the mortgage provided for in his contract and for general relief. Personal service was had upon defendants, Frank Elvin and J. C. Elvin, and a *lis pendens* was filed by plaintiff. On April 15, 1908, default judgment was entered for plaintiff. The cause was continued for two terms without final judgment having been rendered, and on January 11, 1909, F. A. Laurence was on his own application, and against plaintiff's objection, made a party defendant on the ground that he claimed to be the owner of the land described in the contract, and by leave of the court filed an answer which was a general

denial and plea that he had purchased the land from J. C. Elvin, that J. C. Elvin had purchased from Frank Elvin, and that both Laurence and J. C. Elvin bought in good faith without actual knowledge of plaintiff's claim for a lien on the land. Upon motion of defendant Laurence the default judgment was set aside and a hearing had on the question as to whether plaintiff's demand against Frank Elvin should be enforced against the land. The court heard the testimony and dismissed plaintiff's bill, and he has appealed.

As a preliminary question plaintiff insists error was committed by the court in permitting Laurence to be made a party and to defend in this case after default judgment had been entered. Laurence purchased the land after the suit was begun, but as he claimed to have purchased the land in good faith for value and without actual knowledge of the pending suit, it was within the power of the court, in the exercise of a wise discretion, to permit him to come in and defend any time before final judgment. [R. S. 1909, sec. 2094.] And we do not think that discretion was unwisely exercised in this case. If it were true, as claimed by Laurence, that he had paid value for the land without actual knowledge of plaintiff's claim, it was but fair to him that plaintiff should be required to show some ground for fastening his claim upon this land before he should be permitted to subject it to the payment of his debt, and thus deprive Laurence of his title thereto.

The filing of *lis pendens*—which filing was admitted by defendant Laurence—precluded Laurence from holding the land against plaintiff if to do so would work injury to plaintiff. The fact, however, that Laurence claimed to have purchased the land in good faith and without actual knowledge of plaintiff's claim, made it the duty of the court to protect Laurence's interest in this land if it could be done without injury to plaintiff. Whether this judgment should stand or fall must, there-

fore, depend upon whether plaintiff has shown himself entitled to equitable relief by a decree for specific performance, or for a money judgment and a lien upon this land to enforce it.

Specific performance of a contract is not awarded by a court of equity as a matter of right, but rests in the sound discretion of the court and whether it will be granted or withheld in a given case must be determined by the facts of that case. [Davis v. Petty, 147 Mo. 374, 48 S. W. 944; Brevator v. Creech, 186 Mo. 558, 572, 85 S. W. 527; Sease v. Cleveland Foundry Co., 141 Mo. 488, 42 S. W. 1084; Gottfried v. Bray, 208 Mo. 652, 660, 106 S. W. 639.] When a party asks specific performance it is the duty of the court to consider the interests of everybody concerned and if, under the circumstances of the case, it would be inequitable to enforce specific performance, such relief will be denied. [Veth v. Gierth, 92 Mo. 97, 104, 4 S. W. 432.]

One of the requisites to the exercise of equitable jurisdiction is the absence of an adequate remedy at law. Equity does not supplant the law but only lends its aid when the legal remedy is in some way inadequate. The real end sought to be attained in this case is damages for a breach of contract and security for such damages. Why should the security be exacted and what reason is there for asking a court of equity to enforce it as a lien upon the land in question? If defendant, Frank Elvin, who breached his contract, is solvent so that a money judgment can be collected by execution, then plaintiff has an adequate remedy at law and there is no occasion for him to apply to a court of equity for protection. There is no testimony whatever in this case as to whether defendant, Frank Elvin, was solvent or insolvent. Plaintiff charged him to be insolvent, but this is put in issue by the answer of Laurence, and since plaintiff is only seeking to recover and enforce collection of a money judgment the burden was upon him to prove the insol-

vency of Frank Elvin in order to place himself in a position to insist upon his right to have his demand made a lien upon the land Frank Elvin had agreed to pledge as security for his debt to plaintiff. Having failed to do this he has failed to show any ground for equitable relief. Especially is this true when to grant the relief demanded would result in robbing the defendant, Laurence, of his title to the land. Such a result ought not to be fostered unless there was some necessity for it.

It is finally insisted by plaintiff that if he is not entitled to specific performance he is, at least, entitled to a money judgment against Frank Elvin. The difficulty in plaintiff's way upon that proposition is that the record in this case fails to show that such relief was specifically asked at the hands of the trial court; neither did the plaintiff in his motion for new trial call the attention of the trial court to the fact that he might be entitled to a money judgment. Not having called the trial court's attention to this matter he is not now in a position to insist upon it here. [Sweet v. Maupin, 65 Mo. 65; Lynch v. Railroad, 208 Mo. 1, 1. c. 44, 106 S. W. 68.] The judgment will be affirmed. All concur.

**SLIGO FURNACE COMPANY, Appellant, v. HO-
BART-LEE TIE COMPANY, Respondent.**

Springfield Court of Appeals, February 6, 1911

1. **CONVERSION: Cutting Timber: Mistake: Willful Trespass: Measure of Damages.** Defendant cut timber from plaintiff's land, made the same into railroad ties and removed the ties from the land. In an action for conversion the rule for fixing the measure of damages is declared to be that if the timber was taken by honest mistake, then the measure of damages is the value of the timber before being cut, but if defendant knew he had no right to it and thus became a willful trespasser, then the measure of damages is the value of the timber in its improved condition without reduction for labor bestowed or expense incurred by the wrongdoer.

Furnace Co. v. Tie Co.

2. ———: ———: **Evidence Not Sufficient to Show Good Faith.** In an action for conversion it appeared that defendant had cut timber from plaintiff's land and made it into railroad ties. The defendant claimed and the trial court found that the timber was cut in good faith under an honest mistake of the defendant's agents that the land belonged to defendant. The evidence on this question is examined and *held* that there was no substantial evidence tending to show that defendant's agents acted in good faith.
3. **WORDS AND PHRASES:** Unlawful: Willful. The terms "unlawful" and "without right" are not synonymous with "willful."

Appeal from Dent Circuit Court.—*Hon. L. B. Woodside,*
Judge.

REVERSED AND REMANDED.

William P. Elmer, A. H. Harrison, G. E. Woodside
and *G. C. Dalton* for appellant.

(1) Plaintiff is entitled to recover for the value of the manufactured product, regardless of the intent, mistake or good faith of defendant in converting the timber. *Mohr v. Langan*, 162 Mo. 474; *Hendricks v. Evans*, 46 Mo. App. 316; *Bolles v. Woodenware Co.*, 106 U. S. 432; 28 Am. and Eng. Ency. Law (2 Ed.), 722; *Waverly Timber Co. v. Co-Operating Co.*, 112 Mo. 383; *Blockmer v. Railroad*, 101 Mo. App. 557. (2) The proper measure of plaintiff's damages is the value of the ties at the time of demand for payment and defendant cannot plead or claim it improved the property or increased the value by its money or labor, to defeat plaintiff's recovery of the specific property. *Hendricks v. Evans*, 46 Mo. App. 316. (3) Even if the better rule be as expressed in the text and cases cited below, that the taking must be willful, wrongful, and without color or claim of right before plaintiff can recover for the value of the manufactured product, the testimony in this cause brings the conversion within that rule. Young

v. Lumber Co., 100 S. W. 784; Werner Stove Co. v. Pickering, 119 S. W. 333; Blackmer v. Railroad, 101 Mo. App. 557. (4) The burden of showing mistake and good faith in the taking of the timber, rested upon the defendant. Young v. Lumber Co., 100 S. W. 784. (5) The verdict or finding of the court will be set aside on appeal when there is no evidence whatever to sustain it. Flanders v. Green, 50 Mo. App. 371; Ettlinger v. Kohn, 134 Mo. App. 492; Moore v. Railroad, 28 Mo. App. 622; Hinchey v. Koch, 42 Mo. App. 230; Bank v. Railroad, 98 Mo. App. 330; Spiro v. Transit Co., 102 Mo. App. 250.

Harry Clymer and Frank H. Farris for respondent.

(1) The measure of damages under the evidence in this case is the reasonable value of the timber in the tree at the time of the alleged conversion. Land & Lbr. Co. v. Tie Co., 87 Mo. App. 178; Railroad v. Jones, 77 S. W. 955; Young v. Lumber Co., 100 S. W. 785; Werner Stave Co. v. Pickering, 119 S. W. 333; White v. Yawkey, 54 Am. St. Rep. 159; Beede v. Lamprey, 10 Am. St. Rep. 426; Chappell v. Reduction Co., 91 Am. St. Rep. 820; 28 Am. and Eng. Ency. Law (2 Ed.), 722, 724; 13 Ency. of Evidence, 103. (2) The rule now generally accepted as being the correct one is that when the original taking is without wrongful intent or purpose, and under the belief that the taker has a right to the property and the value thereof has been increased by the expenditure of labor or money, the owner is entitled to recover only the value of the property in its unimproved condition. Austin v. Coal Co., 72 Mo. 544; Herdic v. Young, 93 Am. Dec. 739; Ayers v. Hubbard, 58 Am. Rep. 361; Woodenware Co. v. United States, 106 U. S. 432; Pine River Logging Co. v. United States, 186 U. S. 293; Anderson v. Besser, 91 N. W. 736; Whitney v. Huntington, 33 N. W. 561; King v. Merriman, 35 N. W. 570; Hungeford v. Redford, 29 Wis. 345; Tut-

tie, trustee v. Wilson, 52 Wis. 643. (3) It is only when the original taking was willful, wrongful and without color or claim of right, that the measure of damages are fixed at the improved value of the property. Penfield v. Sage, 71 Hun (N. Y.) 573.

COX, J.—Action for conversion of railroad cross ties, trial by court, judgment for plaintiff for \$476 as value of the property, and \$57.12 interest, and plaintiff has appealed.

The petition alleged plaintiff to be the owner of certain timber lands in Dent county, and that defendant unlawfully and without right trespassed thereon and cut the timber and made it into railroad cross ties, and converted the ties to its own use. The answer was a general denial. A specific finding of facts was asked and the court found that the agents of defendant were not willful trespassers but had cut the timber by mistake, believing it to be located on land from which they had bought the timber and for that reason the court assessed the value of the ties at their value as they stood in the trees.

Appellant insists, first, that the measure of damages was the value of the ties regardless of the question of good faith in cutting them from plaintiff's land.

Second. That if the court adopted the correct measure of damages his finding that the timber was cut by honest mistake is not supported by the testimony.

In our judgment the true rule for fixing the measure of damages is that if the timber was taken by honest mistake, then the value of the timber before being cut is the measure of damages, but if the party taking the timber knew he had no right to it, and thus became a willful trespasser in the first instance, then in a suit against him the measure of damages is the value of the timber in its improved condition without reduction for labor bestowed, or expense incurred by the wrongdoer. [U. S. v. Ute Coal & Coke Co., 158 Fed. 20; Ayers v.

Hobbs, 84 N. E. 554; Central Coal Co. v. John Henry Shoe Co. (Ark.), 63 S. W. 49; Everson v. Seller (Ind.), 4 N. E. 854; Wittiff v. Spreen (Tex.), 112 S. W. 98; Kentucky Stave Co. v. Page, 125 S. W. 170; Young v. Pine Ridge Lumber Co. (Tex.), 100 S. W. 784; Thompson v. Carter (Va.), 65 S. E. 599; Bolles v. Woodenware Co., 106 U. S. 432.] In the Bolles case last cited, after stating the rule as above outlined, it is said that "This is now the generally accepted rule both in England and in this country."

The law is not only careful to compensate the owner for the loss of his property, but it is also careful to see that a willful wrongdoer shall not profit by his own wrong, and by requiring him to respond in damages for the value of the property in its improved state both these purposes are accomplished. To fix the measure of damages at the value of the property in its improved condition when the party had taken it by honest mistake would be as harsh as to fix it at the value in the tree when taken by a willful trespasser would be unjust. In the former case the owner would be profiting by the labor of an honest man mistakenly bestowed upon his property and in the latter case a willful trespasser would be profiting by his own wrong. The rule adopted in the cases above cited, and which was followed by the trial court in this case is just and fair to both parties and, therefore, right.

We do not find that this precise question has been heretofore passed upon in this state, but we do think that the principle involved has been recognized. Thus in Gray v. Parker et al., 30 Mo. 160, an action in replevin, the court, in discussing the general question of the rights of the parties, uses this language. "If property is taken from the rightful owner by a willful trespasser and manufactured or converted by him into a different article, nevertheless, the title to the property will not be changed, and it will still belong to the owner of the original material if he can identify it. But this

is not the law when the chattel is converted by the innocent holder or purchaser into a different specific article. The law makes a distinction in acquiring title to property by accession between a willful trespasser and an involuntary wrongdoer. As the law will not permit any man to take advantage of his own wrong, so the former never can acquire any title however great the change wrought on the original article may be; while the latter may." [See, also, *Hendricks v. Evans*, 46 Mo. App. 313; *Blackmer v. The Railroad*, 101 Mo. App. 557, 73 S. W. 913; *Austin v. Coal Co.*, 72 Mo. 535.] We find no case in this state controverting this doctrine. In *land and Lumber Co. v. Moss Tie Co.*, 87 Mo. App. 167, the issues depended upon the title to the land, and no question was raised as to good faith. In *Hosli v. Yobel*, 57 Mo. App. 622, an action for conversion of hay, the court held that, under the facts in that case, the measure of damages was the value of the standing grass before being cut. The statement of the case, however, shows the hay to have been cut by the lessor from the leased premises and he claimed he had the right to the hay, so the question of whether or not he was a willful trespasser was not involved in that case. Many of the cases in this state, as in *Spencer v. Vance*, 57 Mo. 427, use this language. "In conversion the measure of damages is the value of the property *at the time of conversion*." But the question of the right of the owner to sue for and collect the value of property after being enhanced in value by the labor of the wrongdoer was not involved, and the distinction between the rights of a plaintiff against a willful trespasser and an innocent wrongdoer is not discussed; hence, none of these cases are controlling in this case.

It is conceded by all the authorities that in the case of a willful trespasser the owner may follow and retake the property in his hands notwithstanding it may have been largely increased in value by the labor of the trespasser, and, to our mind, it would be illogical to hold

that if the owner of the property should see fit to retake the property he could take it in its improved condition, but if he should elect to sue for its conversion he could not recover for its increased value by reason of its improved condition. Our conclusion is that the court adopted the correct rule as to the measure of damages in this case, and that point must be ruled against appellant.

This brings us to the question of whether the finding of the court that defendant's agents acted in good faith is sustained by the testimony.

The plaintiff proved, and the court found, that defendant's agents cut the plaintiff's timber. The land upon which the timber was cut was the north half, southeast quarter, section 5, township 34, range 2, and south half, section 8, and south half northeast, section 8, township 34, range 2. As to the land in section 5, it appears that land adjoining it, both north and south, belonged to parties in Illinois, and they sold the timber thereon to one G. S. Durham and Durham sold to defendant. In the contract from Durham to defendant, the north half, southeast section 5, which it is now conceded is the property of plaintiff, was included. This contract was dictated to a stenographer by Mr. Lunsford, the representative of defendant, and at the time he did so he had the contract from the owners to Durham before him and used it to secure the description of the land. Lunsford did not testify, and whether he inserted the north one-half southeast section 5 by mistake, or did so intentionally, there is no testimony, and defendant offered no explanation as to how this land got into the contract; neither does it in any way appear why Lunsford was not offered as a witness to explain it, if it could be explained. The evidence further shows that the timber contract from Durham to defendant was executed January 11, 1907, and in April, 1907, Mr. Robinson, who was manager for defendant in having the

timber cut and made into ties, stated to A. N. and J. W. White that this eighty did not belong to defendant. The evidence also shows that the ties were all cut from land both north and south of this eighty before any were cut upon this eighty. Giving this testimony the most favorable construction to defendant possible, and it forces us to the conclusion that when defendant secured this contract from Durham it understood that this eighty was not included, and acting upon that belief the timber was cut from land on both sides of it, and the timber upon this eighty left untouched. The contract from the owners to Durham was turned over to defendant's agents with the contract from Durham to it, and had Robinson looked at these papers he would have at once discovered that Durham could not sell the timber on this eighty, and since he did understand, as he stated to the two Mr. Whites, that defendant did not own the timber on this eighty, we must assume that he had read these contracts, and knew their contents, and this, coupled with the fact that timber was cut on both sides of this eighty before this eighty was touched, leads to but one conclusion, and that is, that the cutting of the timber on this eighty was willfully done. As to the timber cut on land in section 8, it is sufficient to say that the evidence shows that defendant bought the timber on fifteen acres adjoining this land, and in cutting the timber from the fifteen acres the agents of defendant got over the line a half mile. This is the only evidence bearing on the question of good faith as to the timber cut in section 8, and it, instead of showing good faith, shows a wanton disregard of plaintiff's rights. We find nothing in this record from which a finding that defendant's agents acted in good faith can be sustained.

Upon a retrial the plaintiff should amend its petition by making a direct charge of willfulness. The terms "unlawful and without right" are not synonymous

with willful. [State v. Hussey (Maine), 11 Am. Rep. 209; State v. Massey (N. C.), 2 S. E. 445.]

The judgment will be reversed and the cause remanded. All concur.

SEDALIA NATIONAL BANK, Appellant, v. LILLIAN F. RUDERT et al., THOMAS J. STINSON, Respondent.

Kansas City Court of Appeals, February 13, 1911.

1. **ATTACHMENT:** Situs: Statutory Law. The statute (sec. 1752, R. S. 1909) requiring all suits by attachment to be brought in the county where the property attached is situated, is a part of the practice act applicable to a suit when the property alone is proceeded against, or when there are no other defendants in the same county.
2. ———: ———: ———: By the provisions of the statute as to the place where ordinary actions shall be brought in connection with the statute providing where actions by attachment shall be brought, an action by attachment may be brought in the county where a defendant resides, or, if a non-resident, in the county where he may be found, although he has no property in such county; and an attachment writ may be directed to a county where such defendant has property, and the property there levied upon.

Appeal from Jackson Circuit Court.—*Hon. W. O. Thomas, Judge.*

AFFIRMED.

Botsford, Deatherage & Creason for appellant.

(1) The circuit court of Vernon county did not have any jurisdiction and its judgment was void in the case of the action of the First National Bank of Nevada against these defendants, for the reason that neither of

the defendants lived in Vernon county and had no property in that county. R. S. 1899, secs. 563, 387; McGrew v. Foster, 54 Mo. 258, 261; Carter v. Arbuthnot, 62 Mo. 582; Huxley v. Harold, 62 Mo. 516; Monarch Rubber Co. v. Bunn, 82 Mo. App. 603. (2) A proceeding against a garnishee, while in the nature of a levy on property or credits in his hand, is personal as against him, and money or property in the hands of a third party can only be reached by garnishment process against him. This would seem to be fundamental and axiomatic in the law of garnishment and would not seem to require the citation of statutes or authorities. A mere levy of an execution or attachment on real estate is not a garnishment nor process of a suitable kind to bind a garnishee, like the trustee, Stinson, personally, with any surplus coming into his hands from the sale of the real estate. And even though the surplus in the hands of Stinson, trustee, may for certain purposes be regarded as real estate, the same as was the real estate which was sold, still our courts have always recognized that it is necessary in order to reach the surplus in a suit against the mortgagor, to do so by attachment and process of garnishment against the trustee. Casebolt v. Donaldson, 67 Mo. 308; McGuire v. Wilkinson, 72 Mo. 199; Eubank v. Finnell, 118 Mo. App. 535.

M. T. January and Johnson & Lucas for respondent.

(1) When a suit is commenced by summons, plaintiff may at any time before judgment, sue out an attachment and the writ may be levied on property of the defendant anywhere in the state. R. S. 1899, sec. 378; Carter v. Arbuthnot, 62 Mo. 582; Donnell v. Byern, 80 Mo. 332. (2) When judgment is rendered in an attachment suit, the attachment is merged in the judgment, but the judgment for its priority relates back to the date of the attachment. Green v. Dougherty, 55 Mo.

Bank v. Rudert.

App. 217; Drake on Attachment (7 Ed.), sec. 224a R. S. 1899, sec. 401. (3) On foreclosure of a deed of trust, the surplus in the trustee's hands is disposed of as realty and not as personalty. Kregling v. O'Brien, 97 Mo. App. 384. (4) On foreclosure of a deed of trust, the trustee holds the surplus, charged with the same liens the land was charged with. Markey v. Langley, 92 U. S. Sup. Ct. 142; McGuire v. Wilkinson, 72 Mo. 199; 2 Perry on Trusts (2 Ed.), sec. 602ff. (5) The lien of the judgment of the First National Bank of Nevada, on the surplus in the hands of the trustee being superior to that of the Sedalia National Bank, the trustee only performed his duty in crediting that surplus on the first mentioned judgment. (6) It is stated as a general proposition that a garnishee is liable to an attaching creditor if he would be liable at the suit of the defendant in attachment. The attaching creditor has no greater or different right as against a garnishee than defendant himself has. Drake on Attachment (7 Ed.), sec. 462.

ELLISON, J.—This action was brought with an attachment in aid, to recover the amount of a promissory note and Stinson was summoned as garnishee. He answered and was discharged with costs and an allowance of twenty-five dollars for answering. When the case was called for trial the following agreed statement of facts was made, which explains the nature of this action and those connected with it:

“That on June 30, 1908, the First National Bank of Nevada, Missouri, filed a suit in the Vernon Circuit Court against defendant, Lillian F. Rudert, and summons was duly served on her in Vernon county. This suit was on a note for \$1500 and was made by said Lillian F. Rudert as principal and R. A. Lucas as security. The suit was returnable to the October term, 1908, of said court.

On September 2, 1908 said First National Bank duly filed an affidavit and bond and sued out a writ of attachment in the suit aforesaid. Said writ was directed to the sheriff of Jackson county, Missouri, was dated September 2, 1908, and was duly levied by said sheriff September 3, 1908, on the following described real estate situate in Jackson county, Missouri, to-wit:

. . . That said land was then owned by said Lillian Rudert and was encumbered with a trust deed for \$550 and interest; that at the October term, 1908, of the Vernon Circuit Court, said Lillian Rudert filed answer and applied for and obtained a change of venue to Henry county, where on the 26th day of January, 1909, the said First National Bank recovered judgment sustaining its attachment and for the sum of \$1524.50. This judgment was duly assigned to R. A. Lucas, who has ever since been and is now the owner and holder of it.

"After the attachment aforesaid by the First National Bank, the Sedalia National Bank, plaintiff in this case, filed this suit (in Jackson County Circuit Court) and sued out a writ of attachment, which was duly levied on the above described land. Afterwards, on the 27th day of February, 1909, the deed of trust aforesaid for \$550 was foreclosed by Thomas Stinson, the trustee, named therein, and the property was sold to R. A. Lucas for \$800. After satisfying the note and paying the expenses of foreclosure, there was left a surplus of \$333.61 which was applied as a credit on the judgment in favor of the First National Bank of Nevada, then owned by said Lucas. A few minutes after the sale and before the trustee's deed had been made, plaintiff garnished the trustee under an alias writ of attachment in this case. Before the sale, it was understood and agreed between Lucas and the trustee, that in the event that Lucas purchased the property, any surplus remaining should be applied as part payment on said

First National Bank judgment, which agreement was unknown to plaintiff and other bidders at such sale.

"That at the time of the commencement of the suit of the First National Bank of Nevada, Missouri, afore-said, the defendants did not then and have not since resided in said Vernon county, nor in the State of Missouri, but said defendant, Lillian F. Rudert, was temporarily in said Vernon county at the time of the service of summons on her in said First National Bank case, pending in Vernon county. That no property of defendant, Lillian F. Rudert, was found or levied upon in said Vernon county, Missouri, and no attachment writ was issued to the sheriff of said Vernon county, Missouri. That defendant, J. B. Rudert, was not a party to the said suit of said First National Bank of Nevada.

"The First National Bank of Nevada is located in Vernon county. The service on defendants in this case was by publication."

Under the facts of the case, the judgment herein is made to depend upon the validity of the attachment in Jackson county under a writ issued from the circuit court in Vernon county in the suit instituted in that county. Plaintiff contends that that attachment was void, while defendant insists it is valid, and both rely on the statute, as they must, since the statute has set down in arbitrary terms the conditions of jurisdiction. In the action begun in Vernon county by the First National Bank of Nevada, Rudert, the defendant therein, was not a resident of this state, but was temporarily in Vernon county, and personal service had upon him. Afterwards an attachment was issued in the case and sent to Jackson county where it was executed by levy. The statutes (R. S. 1909) relating to the place where suits may be brought with and without attachment, will be noticed. Section 1751, division four, provides that an ordinary action when the defendant is a non-resident of the state, may be brought in any county in the state. It is then provided by section 1752 that:

"Suits commenced by attachment against the property of a person, or in replevin or claim and delivery of personal property, where the specific property is sought to be recovered, shall be brought in the county in which such property may be found; and in all cases where the defendant in actions in replevin or claim and delivery of personal property is a non-resident of the county in which the suit is brought, service shall be made on him as under like circumstances in suits by attachment."

It is further provided by section 2306 that when the action has been commenced by summons, and without original attachment, the plaintiff may, at any time pending the suit and before final judgment, sue out an attachment by filing affidavit and giving bond, as in an original attachment. It is also provided, in section 2314, that "When there are several defendants, who reside or have property in different counties, and when a single defendant in any such action has property or effects in different counties, separate writs may issue to every such county."

As an ordinary action, without attachment, the suit in Vernon county was properly brought in Vernon county, for there the plaintiff resided and the non-resident defendant was found. But in one view of the statute, the suit could not be turned into an action by attachment unless property was also found there, for, in that view, the statute is mandatory that actions by attachment must be brought in the county where the property is. In that view you could no more bring an action by attachment in a county where there was no property than you could bring replevin in such county; the provision as to both is in the same section. In that view section 2306 merely provides for an attachment being taken out after the action has been instituted as an ordinary action, and, it would seem, would confer no additional jurisdiction. So with section 2314, in that view it merely provides for writs to different counties. The suit must be properly brought; that is, in

the county where the property to be attached is located; then, if there are several defendants who reside. or who have property in other counties, separate writs may issue to such counties; and if there is only one defendant and he has property, not only in the county in which he is sued, but in other counties also, separate writs may be issued. In the view stated, all these provisions should be construed in harmony with what is said to be the primary requirement, that a suit by attachment must be brought in a county where the property is. In our opinion the case of *Magrew v. Foster*, 54 Mo. 258, supports the foregoing construction.

But there is another construction which may be given the statute. It is this: That section 1752 should be qualified by section 2314, which provides for an attachment against property situate in a county in which the action is not brought; and by section 1751, defining how an ordinary action may be brought; and section 2306, authorizing an attachment to be taken out in aid of that action. It is argued that since an ordinary action may be brought in a county where the defendant resides, or, if he is a non-resident, in any county where he may be found, and since an attachment may afterwards issue in aid of such action, and since writs of attachment may be directed to other counties where the defendant has property, it cannot be meant that in all instances suit must be brought in the county where the property is located. This view finds support in *Carter v. Arbuthnot*, 62 Mo. 582. In that case an attachment suit was against two defendants and it was brought in the county where one of them resided, but there was no property in that county. The other defendant had property in another county, but he was a non-resident. The court held the action was properly brought in the county where there was no property. It held that the statute requiring suits by attachment to be brought in the county where the property was situated,

was applicable where the action was against the property only; or there are no other defendants residing in the same county. Following that statement, the court made use of this language, as applicable to ordinary attachment actions, *in personam*: "Wherever a defendant resides or has property, the suit may be instituted. *Either the one or the other* gives the jurisdiction." (Italics ours.)

In that case the suit was brought and jurisdiction of the person obtained in the county where one of the defendants resided; while in this case jurisdiction of the person was obtained of a non-resident defendant found in plaintiff's county. But there is no difference, since the statute allows either mode for the proper institution of an action and we can see no reason why an attachment writ cannot as properly go to another county in the latter case as the former. We therefore hold that the attachment levied in Jackson county in aid of the suit in Vernon county, was valid.

The trustee in the deed of trust mentioned in the agreed statement of facts, at the time he sold the land under the deed of trust, knew of the levy of the attachment from Vernon county and that there was a judgment sustaining the attachment. He agreed that if Lucas, the surety on the note sued on in Vernon county, purchased the property any surplus or bid over the amount required to satisfy the deed of trust, should be applied on the Vernon county judgment. But at any rate, the judgment and attachment in the Vernon county suit was prior to the attachment and garnishment made by this plaintiff. The judgment is affirmed. All concur.

**J. H. BARNETT and W. R. O'NEAL, doing business
as Barnett & O'Neal, Respondents, v. ELWOOD
GRAIN COMPANY, Appellant.**

Kansas City Court of Appeals, January 30, 1911.

1. **CONTRACTS: Plea on Merits: Waiver.** The provision of a contract for the sale of grain, that all differences be submitted to arbitration, is waived by a plea to the merits.
2. **——: Demand Drafts: Notice.** Demand drafts must be presented to the drawee, notice by mail or telephone that they are in the hands of a third person for collection not being sufficient. This rule, however, is subject to variation according to the usage of a bank and its customers.
3. **——: Cancellation.** Where the breach of a contract is insignificant in respect to the delay in payment of drafts after notice, defendant having sustained but small damages thereby, the latter is not justified in declaring the contract cancelled.
4. **——: Custom: Damages.** If the custom for ascertaining damages for violations of contracts for the sale of grain, is in conflict with the laws of the state, it would not apply, where the contract provides that it shall be subject in every respect to interpretation under the laws of this state.
5. **——: Damages: Measure of.** Where consequential damages are not sought, the proper measure of damage, in an action for breach of a contract for the sale of grain, is the difference between the contract price of the grain and the price at which a like amount at the time, provided in the contract, could have been purchased in the market the day after they received notice of defendant's intention to cancel the contract.

Appeal from Buchanan Circuit Court.—Hon. C. A. Mosman, Judge.

AFFIRMED.

A. F. Sherman and Spencer & Landis for appellant.

Edmond C. Fletcher and Eugene Silverman for respondents.

BROADDUS, P. J.—This is a suit for damages alleged to have been incurred by reason of the failure of the defendant to comply with the terms of the following contract:

"CONTRACT FOR SALE.—ELWOOD GRAIN COMPANY.

Unless specially agreed otherwise, this contract is subject in all respects to the rules and regulations of the St. Joseph, Missouri, Board of Trade.

ST. JOSEPH, Mo., Dec. 26, 1907.

"Barnett & O'Neal, Alexandria, La.

Dear sir: We hereby confirm sale to you per telegram of Dec. 24th, of 20,000 bushels No. 2 Mixed Corn, 62c Jany. Alexandria St. Joseph weights and St. Joseph grades to govern settlement. Shipment 5,000 bu. monthly during Feb., March, April and May. Demand drafts 62 3-4 for Feb. shipment and 3-4c in addition for each month thereafter including May.

"All sales 'by sample' are made conditional upon acceptance of carlots hereby official St. Joseph Board of Trade Sampler, for account of buyer.

"Account draft when attached to bill of lading to be paid by you. In the event you fail to do so, you hereby promise and agree to pay us the difference between the contract price and the price realized for the grain, together with any and all expenses incurred in disposing of said grain. This contract in every respect subject to interpretation under the laws of the State of Missouri. This constitutes our contract and supersedes all prior negotiations between us on this subject; but if this is not in complete accordance with your understanding of our contract wire us immediately.

ELWOOD GRAIN COMPANY."

The defendant's amended answer set up a denial that it violated the contract, and further that plaintiff had not complied with the terms thereof, in that, it

neglected to pay demand drafts upon the two carloads of corn shipped by defendant to apply on said contract, on account of which breach, defendant had cancelled the same. The answer further alleges that plaintiffs prior to the commencement of this suit agreed to submit this controversy to the regularly constituted board of arbitration of the board of trade of Kansas City, Missouri; and that said matters had not yet been submitted in arbitration through no fault of defendant; that the said Board of Trade rates fixed the damage, if any, in such cases at the difference between the contract price and the market price of said commodity at the place of delivery the day following the announcement of the cancellation of said contract; that by the custom of the grain trade the measure of damages was the same as provided by said board of trade.

The plaintiffs after pleading a general denial, replied that they had fully complied with the terms of the contract, and that they had refused to accept the cancellation of the contract and that they had no knowledge of such a custom as to the measure of damages pleaded by defendant.

The evidence is that: At the request of the plaintiffs, the defendant shipped two cars of corn containing 2518 bushels to apply on said contract; and on January the 29th, 1908, attached the bills of lading to two separate demand drafts for the value of the two cars of corn and deposited them in the First National Bank of Buchanan county, at St. Joseph, Missouri. The drafts were received by the First National Bank of Alexandria, La., on February 1, 1908, and the bank notified them on the same day either by mail or telephone that the drafts were there for collection. It was the custom of plaintiff to pay all drafts at said bank. The defendant not hearing from said drafts, caused the St. Joseph bank to telegraph the Alexandria Bank on February the 4th or 5th, to return all unpaid drafts drawn on the plaintiffs. The Bank of Alexandria thereupon protested

the two drafts, but after the bank had closed for the day permitted plaintiffs to pay the drafts together with the protest fees, and on the following day remitted the proceeds to the Bank of St. Joseph.

Upon learning the fact that the drafts had been held, the defendant telegraphed the plaintiff as follows: "We find you are not paying drafts on demand as per contract. Consequently we are cancelling the balance of your contract." To which plaintiffs replied: "You are wrong, our drafts were paid promptly, ship balance February contract at once. Will not accept cancellation."

On March 18th, Barnett, representing the plaintiffs, and F. J. Delaney, representing the defendant met in Kansas City, Missouri, for the purpose of making a settlement of the differences, but not being able to agree upon the amount of damages, negotiations were had looking to an arbitration of the matter, until finally on June 3d, the defendant made a proposition to submit the said differences to the arbitration committee of the Kansas City Board of Trade, which was accepted by the plaintiffs by telegram on June 6th. Arbitration papers were prepared, but plaintiffs refused to proceed further with the arbitration.

The cashier of the Bank of Alexandria testified that, the reason the drafts were withheld was that, he knew they would be paid. One of the plaintiffs testified that no demand had been made upon plaintiffs by said bank, that he received the invoice for the corn through the mail from the defendant on February 5th, and went to the bank and paid said drafts on said day.

The plaintiffs over the objection of the defendant were allowed to prove that the market price of the corn was the same as that at St. Joseph, plus the cost of transportation. The objection to the evidence is that the plus freight rate was not legal, it not having been shown that such rate was on file with the Interstate Commerce Commission.

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It was shown that prior to the contract in question plaintiffs had been doing business with the defendant as their brokers and that plaintiffs in their demand for damages included in their schedule had a claim for such brokerage, but this claim is not included in the petition and therefore is not an issue. The defendants attempted to show the regular course of business between plaintiffs and their bank as to the payment of drafts, but upon objection they were not allowed to do so, but the court confined the evidence as to what was done as to the particular drafts in question. The defendants offered to show the custom of the grain trade with reference to the ascertainment of the measure of damages accruing on contracts for the purchase and sale of grain which offer the court refused. A bank officer testified that he withheld the drafts at the request of plaintiffs, this however, plaintiffs denied.

At the close of plaintiffs' case the defendants moved to dismiss on the ground that there had been an agreement to arbitrate, which the court overruled, and the motion was renewed at the close of the testimony which the court again overruled.

The theory of the court, as gathered from its rulings and instructions given and refused was that; the agreement to arbitrate was waived by a plea to the merits; that it could not be said that plaintiffs had committed a breach of the contract by failing to pay the drafts until they were presented to them in person by someone having them in possession at the time of presentation; that plaintiffs had the option of refusing to accept defendants' claim of cancellation; that it was immaterial as between the parties to the action that no proof that a list of freight rates from St. Joseph to Alexandria had been filed with the Interstate Commerce Commission; that the custom prevailing for ascertaining the measure of damages on contracts of the character in issue was not applicable and that the custom or habit of the bank at Alexandria in presenting drafts to plain-

tiffs and receiving payment thereof, did not go to show any particular custom, other than that of the law merchant.

The defendant's plea of arbitration is unavailing. It is not pleaded that an agreement has been entered into to arbitrate the cause of action which would have the effect of its discontinuance. *Bowen v. Lazalere*, 44 Mo. 385; *Hyatt v. Wolfe*, 22 Mo. App. 1. c. 201. But the allegation is that an arbitration of the subject-matter of the suit was agreed upon by the parties, but that no such arbitration had been held. It is said: "It is no answer to the merits until there is a good and binding award. It is by no means certain, because there is a submission that an award will follow." *Bowen v. Lazalere*, supra; *Thompson v. Turney Bros.*, 114 Mo. App. 697.

One of the special provisions of the contract is that, plaintiffs should pay demand drafts on them for grain shipped. A question for the court was whether the plaintiff had violated this provision, if they failed to pay upon being notified by mail or telephone, that they were in the hands of the bank for collection. The court took the view that a demand made through the mail or by telephone was not such a demand as the contract contemplated. It is the conceded rule that such demand drafts must be presented to the drawee and that notice that they are in the hands of a third person for collection is not sufficient. But this rule is subject to variation according to the usage of a bank and its customers. [*Maine Bank v. Smith*, 18 Me. 100; *Whitwell v. Johnson*, 17 Mass. 451; *Bank v. Brown*, 22 Me. 295.] Such usage and custom may be shown to modify the general law merchant as applicable to such bank. [*Bank v. L. Pinkers Co.*, 83 N. C. 377; *Fredrick v. Mendall*, 1 N. H. 80.]

The evidence tendered does not show that it was the general usage of the bank to make demand on drafts by mail or by telephone. There was no general rule in

that respect. Sometimes demands for payment of drafts were made upon plaintiffs in person at other times when more convenient, through the mail or by telephone. The evidence did not show such a rule in that respect as would change the rule of the law merchant.

It is true defendant did not know at the time it received the proceeds of the drafts that there had been a delay in their payment after notice and demand, if made, yet it had a right to refuse to make future deliveries and declare the contract forfeited, if the circumstances justified it in so doing. [Bradley v. King, 44 Ill. 339; Eastern Forge Co. v. Corbin, 182 Mass. 590.] But the breach of the contract was so insignificant in respect to the delay in payment of the drafts after notice, and the defendant not having sustained but small damage thereby, we do not believe under the circumstances defendant was justified in declaring the contract cancelled. The breach was technical and the extent of defendant's damage was the use of the money during a short time. [Taussig v. Mill & Land Co., 124 Mo. App. 1. c. 218; 7 Am. and Eng. Ency. of Law, p. 150.]

The holding of the court that the custom of ascertaining damages for violation of contracts of this character did not govern in this case was the correct one. The provision in the contract, that it should be subject in every respect to interpretation under the laws of the State of Missouri, we believe governs. If the custom in such cases in determining the measure of damages was in conflict with the law of the state, it would not apply, therefore it was not material what was such custom.

We accede to the statement of defendant that: "A party to a contract is required to use reasonable diligence to mitigate the damages caused by the obligor's breach." If plaintiffs were seeking to recover consequential damages by reason of the failure of defendant to furnish the corn contracted for, such as losses by reason of their inability thereby to furnish such corn previously sold to customers, then under the rule, the

duty would devolve upon them to go upon the market and buy other corn in order to avoid such loss as far as possible. But as the case stands the suit is not for consequential damages, and plaintiffs were not required to go upon the market to buy other corn, as the difference between the market price and the price fixed by the contract would be the same whether they bought other corn or not. The court instructed the jury properly, that if they found for plaintiffs, they would assess their damages at the difference between the contract price of the corn and the price at which a like amount at the time, provided in the contract, could have been purchased in the market the day after they received notice of defendant's intention to cancel the contract. [Creve Coeur Lake Ice. Co. v. Tamm, 90 Mo. App. 189.]

Among other contentions defendant insists that the contract was made in the name of plaintiffs merely for convenience and that plaintiffs were at a matter of fact acting as brokers, and that such being the case they were not entitled to recover for non-fulfillment of the contract. Such a construction would in effect be in contradiction of the contract and render it a nullity. But it does not in any view justify such a construction, and any evidence, if there was such, tending to show that the plaintiffs were merely acting as brokers for defendant, was wholly inadmissible.

Other questions are raised in appellant's brief, but we do not deem them important. What has been said disposes of every material question raised in the admission or rejection of evidence and in the giving and refusing of instructions. We are further satisfied that the judgment is for the right party and should be affirmed and it is accordingly so ordered. Affirmed. All concur.

STATE ex rel. JOSHUA BARBEE, Respondent, v.
GEORGE BUSSE et al., Appellants.

Kansas City Court of Appeals, February 13, 1911.

1. **ROADS AND HIGHWAYS: Nuisance: Injunction.** Where a road is sufficiently located, and the evidence is overwhelming that it was dedicated to public use by the owners of the land, and accepted by the public as such, and has been in continuous use as such up to the time it was obstructed by the defendants by fences which closed the road, a judgment abating the nuisance, and enjoining the defendants from further maintaining the fences, is proper.
2. ———: **Statutes.** Section 9694, R. S. 1899, refers to roads that have been opened by order of the county court, in which there were irregularities in the proceedings, and where there had been non-user for ten consecutive years, and has no bearing where it is sufficiently shown that labor was expended on the road in question.
3. ———: ———: Section 9472, R. S. 1899, refers in part to roads established solely by dedication or public user, and has no bearing where it is sufficiently shown that labor had been expended on the road in question, coupled with the further fact that this section was first enacted in 1887, at which time the road in question had been in use by the public previously for ten consecutive years.

Appeal from Saline Circuit Court.—*Hon. Samuel Davis,*
Judge.

AFFIRMED.

A. F. Rector and *D. D. Duggins* for appellants.

Joshua Barbee and *Robert M. Reynolds* for respondent.

BROADDUS, P. J.—This is an injunction suit by the state at the relation of the prosecuting attorney of Saline county, to abate a nuisance upon a public road

and to restrain defendants from maintaining the same.

The road is described as follows: Beginning at the center of section 22, township 5, range 19, in said county, running thence west along the center line east and west of said section a distance of one-fourth of a mile, more or less, to the northeast corner of the northwest corner of the southwest quarter of said section 22, thence along the east side of the said northwest quarter of the southwest quarter of said section, thence in a direct line west along the south side of said tract of 27 acres, and along the south side of said north 27 acres, more or less, of the northeast quarter of the southeast quarter of section 21, township 50, range 19, to the intersection of another public road running north and south through said section 21 at the southwest corner of said northeast quarter of said southeast quarter.

The road was not laid out by the authority of the county court, but it is the contention of the state that it was dedicated as a public road by the owners of the land.

It appears from the evidence that in about the year 1870, the Thornton family who owned the land through which the road is located threw it open for the use of the public. In 1873 or 1874 its location was changed by the owners and a fence built by them on each side leaving a space for travel thirty feet in width.

The testimony of a number of witnesses, some of whom were the descendants of the Thorntons who fenced this space, was that, the road was used as such continuously from that time on without interruption, until the 28th day of April, 1908, when it was closed up by the defendants. During the early years after it was so opened, it was worked by the road overseers, but has not been since the adjoining land came into the possession of the defendants, although some work was done on it by private individuals in about 1880. There is some evidence that defendants at some time after they became the owners and took possession of the adjoining

lands, on each side, erected gates at both ends of the road, but that the public continued to use it for travel. In the course of time the fences decayed in most places, but there was still enough of them left to indicate where the original space of thirty feet in width was left for the road.

In 1892 the defendants petitioned the county court to vacate it, but for some reason or other the petition was not granted.

The evidence of defendants tends to show that after they moved upon the surrounding lands the traveled space narrowed down to such an extent that it did not conveniently admit of the passage of teams. But all of the testimony, including that of defendants, showed that the road was used for travel more or less by the public up to the day on which defendants closed it.

The court rendered judgment abating the nuisance and enjoined defendants from the further maintaining of the fences which obstructed the passage on said road. The defendants appealed.

The contention of the appellants is that; the facts do not show a dedication of the road to public use. They rely to sustain their position upon the holding in *Vossen v. Dantel*, 116 Mo. l. c. 384, but as the facts there showed, that the proprietor opened out the way over his own unenclosed timber lands for his own convenience, the court held it was not a dedication for public use. The case has no bearing on the question here. Other cases cited by appellants are equally inapplicable.

The appellants invoke the protection of section 9694, Revised Statutes 1899, but said section refers to roads that have been opened by order of the county court, in which there were irregularities in the proceedings and where there had been non-user for ten consecutive years. And section 9472 refers in part to roads established solely by dedication or public user, which provides that: "no lapse of time shall divest the owner of his title to his land, unless, in addition to the use

of the road by the public for the period of ten consecutive years, there shall have been public money or labor expended thereon for such period."

Neither of these sections have any particular bearing on the question as it was sufficiently shown that labor was expended on the road in question. And the latter section would have no bearing on the question as it was first enacted in 1887, at which time the road had been in use by the public previously for ten consecutive years. [Sikes v. Railroad, 127 Mo. App. 1. c. 333.]

The road is sufficiently located and the evidence is overwhelming that it was dedicated to public use by the owners of the land, and accepted by the public as such, and has been in continuous use as such up to the time it was obstructed by defendants.

It is further contended that the description in the decree does not correspond to that given in the petition, but we hold that it is substantially the same. Affirmed. All concur.

H. H. BANKS, Trustee in Bankruptcy of W. H. Leonard, Respondent, v. CHICAGO, BURLINGTON & QUINCY RAILROAD COMPANY et al., Appellants.

Kansas City Court of Appeals, February 13, 1911.

1. **CARRIERS: Contracts: Evidence: Contemporaneous Oral Agreement.** In an action to recover damages on account of the alleged breach of a written contract for the transportation of horses from U. to S., where the horses shipped at U. did not make up a carload, but the shipper proposed to the carrier that the car be stopped at C. that he might add eleven other horses, it is error to submit to the jury the issue of whether an oral agreement, contemporaneous with the written contract, was made by the parties, when the written shipping contract contained the words, "Stop C. to fill."

2. ———: ———: ———: ———: The words of the stipulation in the written contract, "Stop C. to fill" standing alone do seem obscure, but considered in the light of their context, and of the nature and circumstances of the transaction, their meaning is clear and certain that a stop was to be made at C. to enable the shipper to fill with other horses the partly loaded car. Under the rule that where a stipulation of a written contract is obscure in meaning, oral evidence is admissible for the purpose of ascertaining the meaning intended, the words of the stipulation cannot be construed to mean that a stop should be made to enable the shipper to unload and feed for two weeks.
3. ———: ———: ———: ———: The duty of a carrier to exercise proper care for the preservation of live stock in transportation should not be extended to compel a break in the transportation for two weeks in order that the shipper may improve, instead of merely preserve, the physical condition of his property. Where such a privilege is not stipulated for in the written contract, and that contract appears to cover the whole transaction, the privilege cannot be established by proof that it was the subject of a contemporaneous oral agreement.

Appeal from Boone Circuit Court.—*Hon. Nicholas D. Thurmond*, Judge.

REVERSED AND REMANDED.

E. W. Hinton for appellants.

(1) The written and printed bill of lading purported to be a complete contract between the parties for the transportation in question, and hence it was error to permit the plaintiff to add additional stipulations for a two weeks stop, by parol evidence of prior negotiations. *Koons v. Car Co.*, 203 Mo. 227; *Boggs v. Laundry Co.*, 171 Mo. 282; *Blake v. Jaeger*, 81 Mo. App. 239; *Helm v. Railroad*, 98 Mo. App. 419; *Thompson v. Libby*, 34 Minn. 374, 26 N. W. 1; *Violette v. Rice*, 173 Mass. 82. (2) The alleged contract was illegal and void because it granted the shipper a greater privilege than that provided in the tariff schedules. *Lyne v. Railroad*, 170 Fed. 847. (3) The written bill of lading, plus the parol additions, did not create a joint

liability and hence it was error to permit a joint recovery. *McLendon v. Railroad*, 119 Mo. App. 128; *Meyers v. Railroad*, 120 Mo. App. 288; *Pipe Co. v. Railroad*, 137 Mo. App. 479; *Crockett v. Railroad*, 126 S. W. 250. (4) Even by the aid of the parol evidence, the plaintiff failed to make out a several liability against either defendant because the C. B. & Q. Company did not undertake to carry beyond Moulton, Iowa. *McLendon v. Railroad*, 119 Mo. App. 128; *Crockett v. Railroad*, 126 S. W. 243. (5) The instruction as to the measure of damages was erroneous in allowing the jury to award the increased price for which the horses might have sold if they had been fattened for two weeks, because no such damage could have been contemplated in the absence of some notice to defendants that the horses needed feeding to fit them for market. *Hadley v. Baxendale*, 9 Exch. 341; *Rogan v. Railroad*, 51 Mo. App. 665; *Abeles v. Telegraph Co.*, 37 Mo. App. 554; *Wilson v. Russler*, 91 Mo. App. 275.

N. T. Gentry for respondent.

(1) No error was committed by the trial court in permitting oral evidence to be introduced to prove that the appellants agreed to stop the car at Centralia, Missouri and allow Mr. Leonard to feed, water and rest his fifteen horses, and then to load said horses, and eleven other horses, on said car. As a general proposition, parol evidence is not admissible to add to or to vary a written contract; but that rule has exceptions which are as old and as well established as the rule itself. *Brown v. Bowen*, 90 Mo. 189; *Greening v. Steele*, 122 Mo. 294; *Van Meeter v. Pool*, 110 S. W. 5; *Lumber Co. v. Warner* supra; *Bonney v. Morrill*, 57 Me. 368; *Bashor v. Forbes*, 36 Md. 154; 1 Greenl. on Ev., sec. 284a; 1 Elliott on Ev., secs. 577, 518; *Underhill on Evidence*, pp. 307, 308; *Lawson on Contracts*, secs. 378, 384; 1 Beach on Contracts, sec. 28; 9 Ency. of Evidence, p. 350; 9 Cyc.

of Law, pp. 587, 588; 2 Parsons on Contracts (7 Ed.), sec. 548. (2) A common carrier may contract to carry beyond its own line. It is well settled that where several common carriers each having its own line, associate and form what to the shipper is a continuous line, and contract to carry goods through for an agreed price which the shipper pays in one sum, and which the carriers divided among themselves, then they are jointly and severally liable to the shipper with whom they have contracted for a loss taking place on any part of the whole line. *White Com. Co. v. Railroad*, 87 Mo. App. 334; *Sherwalter v. Railroad*, 84 Mo. App. 589; *Wyman v. Railroad*, 4 Mo. App. 35; *Harp v. Grand Era*, 1 Woods (U. S. C. C.) 184; *Railroad v. Wilkins*, 44 Md. 11; *Barton v. Wheeler*, 49 N. H. 25; *Quimby v. Vanderbilt*, 17 N. Y. 306; *Choteaux v. Leach*, 18 Pa. St. 224; *Steamboat Co. v. Brown*, 54 Pa. St. 77; *Hutchinson on Carriers*, sec. 158. (3) Finally, it will be seen that the judgment in this case follows that line of decisions, which hold that a common carrier is liable for its failure to properly deliver freight entrusted to it. On that subject, an eminent author said, "Every delivery must be made to the right person, at a reasonable time, at the proper place, and in a proper manner." *Hutchinson on Carriers*, sec. 340; *Bartlett v. Philadelphia*, 32 Mo. 256; *Tandy v. Railroad*, 68 Mo. App. 431; *Leaving v. Transportation Co.*, 42 Mo. 88; *Story on Bailments* (9 Ed.), secs. 543, 574.

JOHNSON, J.—This is an action to recover damages on account of the alleged breach of a contract of the defendant carriers for the transportation of a shipment of horses from Unionville, Missouri, to the stock yards at East St. Louis, Illinois.

W. H. Leonard, a dealer in horses, entered into a written contract with the Chicago, Burlington & Quincy Railroad Company on September 8, 1908, by the terms of which the company received and undertook to trans-

port fifteen horses from its station at Unionville, Mo., to Moulton, Iowa, and there deliver them to the Wabash Railroad Company for further transportation to East St. Louis. The horses did not make a carload but Leonard had other horses near Centralia, Missouri, a station on the Wabash road, and proposed to the company that the car be stopped at that point and that he might add eleven other horses to the shipment to make a carload.

Accordingly the agent wrote on the shipping contract the words, "Stop Centralia Mo. to fill" and added five dollars to the transportation charges for the privilege thus granted. Leonard intended to sell the horses on the market at East St. Louis and they were in poor condition for immediate sale owing to the fact that being grass fed only they were poor and shabby looking. His purpose was to unload them at Centralia, take them out to a farm where he had arranged for their reception and care, have them well fed for two weeks and then reship them on to market together with eleven other horses. Over the objections of the defendants plaintiff was permitted to introduce testimony tending to show that Leonard had an oral agreement with the agent of the carrier made at the time of the execution of the shipping contract that he should be permitted to carry out this plan and that the extra charge of five dollars was imposed for the privilege of stopping and unloading at Centralia and holding the horses there two weeks for feeding.

The Burlington Company carried the horses to Moulton, Ia., and there delivered them to the Wabash Company which carried them through to East St. Louis without stopping at Centralia. In consequence of this breach of the alleged oral contract the horses were prematurely forced on the market and, owing to their poor condition, were sold at a great sacrifice.

Leonard presented a claim to the Wabash Company for the damages resulting to him from the breach

of the oral contract. That company refused to recognize the validity of that agreement but stood on the written contract and offered to compensate Leonard for the damages he suffered on account of the breach of the stipulation to stop at Centralia to receive an addition to the load. The judgment before us is for plaintiff and is an expression of Leonard's theory of the nature and scope of his contractual relation to defendants. Before the trial Leonard became a bankrupt and the action is prosecuted by his trustee in bankruptcy as plaintiff.

The issues contested at the trial and argued in the briefs of counsel cover a wider field than we shall cover in the statement of facts and opinion. We think the learned trial judge erred in submitting to the jury the issue of whether or not an oral agreement contemporaneous with the written contract was made by the parties. When a written contract, on its face, purports to cover the entire transaction between the parties, the rule is elementary that all prior and contemporaneous parol negotiations and agreements are merged in the written contract and afterward cannot be employed by either party to enlarge, alter or modify the terms of the written contract.

Counsel for plaintiff acknowledge this rule but seek to avoid its application on two grounds, viz., first, that the stipulation in the written contract "Stop Centralia Mo. to fill" is an obscure expression of the agreement intended to be expressed which justifies the introduction of explanatory parol evidence and, second, aside from that stipulation the written contract omits to make any provision for feeding and watering during the transportation from Unionville to East St. Louis and, consequently, is incomplete on its face and may be pieced out by the oral contract.

The first of these propositions invokes the well-settled rule that where a stipulation of a written contract is obscure in meaning, oral evidence is admissible for

the purpose of ascertaining the meaning intended to be expressed by the language employed. As is said by the Supreme Court in *Edwards v. Smith*, 63 Mo. 119: "A contract . . . may be obscurely expressed, and a knowledge of the relation of the parties, their antecedent acts, and the subject matter of the contract, may enable a court clearly to understand what otherwise would be ambiguous or obscure." But "that rule never applies except in cases where the part of the contract which is reduced to writing shows upon its face that it is incomplete and that it does not purport to be a complete expression of the entire contract." [*Koons v. Car Co.*, 203 Mo. 1. c. 255.] Certainly obscurity in the meaning of a stipulation does not give either party the right to inject into the contract a prior contemporaneous oral agreement as a substitute for the questionable stipulation. To hold otherwise would be to accord to the party offering the parol agreement the right to alter or vary the terms of his written contract. Evidence may be received to *explain* but not to contradict or vary that which may be obscure.

The words "Stop Centralia Mo. to fill" standing alone do seem obscure but considered in the light of their context and of the nature and circumstances of the transaction their meaning is clear and certain. They mean that a stop was to be made at Centralia to enable plaintiff to fill with other horses the partly loaded car. No other reasonable meaning can be accorded the words and the argument that they might be construed to mean that a stop should be made to enable the shipper to unload and feed for two weeks is based on an unnatural and strained construction of what is very plain and simple language. The written contract covered the subject of stopping at Centralia and did not contemplate that the stop should be made for the time and purpose contended for by plaintiff. To permit plaintiff to recover on the oral agreement would be to permit him to abrogate an important stipulation of the written contract and to

substitute therefor an agreement neither the shipper nor the carrier intended to express.

Passing to the second proposition we find in the contract the provision: "Said animals are to be loaded, unloaded, watered and fed by the owner or his agents in charge." There is no mention of the place where a stop shall be made to feed and water. We shall concede, for argument, that, in the transportation of horses from Unionville to St. Louis, proper care of the animals requires that a stop for food and water be made en route and that Centralia was the customary and convenient stopping place. Further we admit, *arguendo*, that when a shipping contract is silent on the subject of where such stop shall be made, evidence of an oral agreement to stop at a certain station is admissible under the rule that "where the instrument of writing does not purport to cover the entire agreement, or a part only of the contract is reduced to writing, then the matter thus left out may be supplied by parol evidence." [Lowenstein v. Railway, 63 Mo. App. 68.]

But these concessions do not aid plaintiff. We are not dealing with a case where the shipper complains of the failure of the carrier to afford him an opportunity to minister to the necessary physical wants of live stock during the course of its transportation, but to a cause of action based on the breach of an alleged agreement to stop the transportation for a long period in order that the shipper might be enabled to improve the condition of his stock and make it more suitable for the market by a course of feeding and attention.

We do not think the duty of the carrier to exercise proper care for the preservation of live stock in transportation—whether such duty be found in the stipulation of the shipping contract or rests wholly on rules of the common law—should be extended to compel a break in the transportation for a period of two weeks in order that the shipper may improve, instead of merely preserve, the physical condition of his property. The

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right of the shipper to such privilege must be expressed in his contract with the carrier and where it is not stipulated for in the written contract and that contract appears to cover the whole transaction, the privilege cannot be established by proof that it was the subject of a contemporaneous oral agreement.

The judgment is reversed and the cause remanded. All concur.

MINNIE C. KINYOUN, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY,
Appellant.

Kansas City Court of Appeals, January 30, 1911.

1. **CARRIERS OF PASSENGERS: Safety Stop.** The cause of action pleaded was the negligence of the carrier in suddenly starting a car while a passenger was in the very act of alighting. The car was stopped at a place not intended for use as a passenger station, and for another purpose than the admission and discharge of passengers. *Held*, that the carrier should not start the car while a passenger is alighting at such a place with the knowledge and consent of the conductor. Hence, a demurrer to the evidence was rightly overruled.
2. ———: ———: **Instructions.** Where the gravamen of the action pleaded was negligence in suddenly starting a car that had been brought to a standstill before plaintiff started to alight, the court did not err in striking out the words "or moving slowly," in an instruction authorizing the jury to find for plaintiff, if they should believe that her fall was caused by the sudden start of the car while she was alighting, and that she was alighting "while said car was at said point, either stopped, or moving slowly." Such instruction enlarged the scope of plaintiff's cause of action to include negligence in starting a car in a case where the forward motion of the car during the effort to alight could have been a co-ordinate factor in producing the injury.
3. ———: ———: Where there is evidence in the record from which the inference would be reasonable that the car was moving so slowly that its motion could not have had any effect on the alighting passenger, it is prejudicial error to hold plain-

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tiff to recovery, if at all, only on finding that the car came to a dead stop, and was in that condition when its sudden start threw her to the pavement.

Appeal from Jackson Circuit Court Court.—*Hon. H. L. McCune*, Judge.

AFFIRMED.

John H. Lucas and Charles N. Sadler for appellant.

(1) The trial court did not err in refusing to give plaintiff's instruction No. 1, in modifying instruction No. 4, and in giving defendant's instruction No. 4. *Bond v. Railroad*, 110 Mo. App. 138; *Peck v. Transit Co.*, 178 Mo., 624; *Behen v. Transit Co.*, 186 Mo., 430; *Ingles v. Railroad*, 129 S. W. 492; *Beave v. Transit Co.*, 212 Mo., 331. (2) The court erred in refusing to give the peremptory instruction in the nature of a demurrer offered by the defendant at the close of plaintiff's evidence, and again at the close of all the evidence; therefore it was error to grant a new trial in any event. *Jackson v. Railroad*, 118 Mo., 199; *Jacobson v. Transit Co.*, 106 Mo. App. 339; *Corum v. Railroad*, 113 Mo. App. 631; *Nurse v. Railroad*, 61 Mo. App. 67, and cases cited; *McCarty v. Railroad*, 105 Mo. App. 596; *Spaulding v. Railroad*, 184 Mass. 470; *Railroad v. Mills*, 91 Ill. 39. (3) The verdict of the jury herein being manifestly for the right party it should not have been set aside by the court and a new trial granted even though all the errors charged in the motion for new trial had been committed. *R. S.* 1909, sec. 2082; *Quinn v. Railroad*, 218 Mo. 545; *Clack v. Subway Co.*, 119 S. W. 1014; *Mockowik v. Railroad*, 196 Mo. 568; *Loftus v. Railroad*, 119 S. W. 942; *Baustian v. Young*, 152 Mo. 325; *Bassett v. Glover*, 66 Mo. 381; *U. S. Mtg. & Tr. Co. v. Crutcher*, 169 Mo. 485.

House & Manard for respondent.

JOHNSON, J.—In alighting from a street car on which she was riding, plaintiff fell and was injured. She alleges her injuries were caused by the negligence of defendant in suddenly starting the car—which had been brought to a complete stop—"before the plaintiff had alighted therefrom and before the plaintiff had a reasonable time to alight therefrom and when the servants and agents of the defendant in charge of said car knew, or by the exercise of ordinary care might have known, that plaintiff was attempting to alight therefrom and was in a position of danger."

Plaintiff became a passenger on a north-bound Prospect avenue car at Thirty-first street and intended to alight at Twenty-fourth street, but on account of the darkness and the rapid speed of the car did not know when she reached her destination and was carried beyond it. She testified that she inquired of the conductor "Have we passed Twenty-fourth?" and that he replied, "Why I should say so. We are at Eighteenth street now." She exclaimed "Oh, my goodness, me!" and went out to the rear platform. The conductor, who was on that platform, rang the bell and came into the car, passing plaintiff on her way out. The car stopped and plaintiff started to step down to the pavement. She seized the handhold at the rear of the vestibule with her right hand and was stepping down when the car suddenly started forward and threw her to the pavement. She supposed the car was stopped at the regular stopping place on the south side of Eighteenth street and that the conductor had caused it to be stopped to permit her to alight. The car had not reached the regular stopping place but had made a "safety stop" at a point some distance south of the regular place for receiving and discharging passengers. The rules of the company required the north-bound cars to stop at a designated point near the middle of the block on account of the hill in that block, and a cross street car line on Eighteenth street. Plaintiff states she did not know

of the practice of making "safety stops" on that hill but, as stated, supposed the car was at Eighteenth street. It is a fair inference from her evidence that, though the car was stopped in the middle of the block, the conductor knew she was alighting and, in effect, invited her to alight at that place.

The evidence of defendant contradicts that of plaintiff in essential features. It tends to show that instead of inviting plaintiff to alight during the safety stop, the conductor, when he learned she had been carried by her destination, said to her, "Wait a minute and I will fix it so you can go back on the next car." Witnesses for defendant say the car only slackened speed at the safety post and did not come to a full stop and that plaintiff's fall was caused, not by a sudden start of the car, but by her awkward attempt to alight from a moving car. The evidence is not in entire accord respecting the slowest speed of the car. The jury might have believed that such speed was over three miles per hour or that it was so slow that for practical purposes it amounted to a full stop.

The jury returned a verdict for defendant, but on the hearing of a motion for a new trial, the court set aside the verdict and granted a new trial on the ground of error "in refusing to give plaintiff's instruction No. 1 and in modifying instruction No. 4, also for giving defendant's instruction No. 4." Defendant appealed and argues there was no error against plaintiff in the instructions and that the court should have sustained defendant's demurrer to the evidence. Counsel for plaintiff filed no brief.

There is no merit in the contention that the court should have taken the case from the jury. The cause of action pleaded is the negligence of the carrier in suddenly starting the car while a passenger is in the very act of alighting. Plaintiff's evidence sustains such cause. When a street car is stopped at a regular stopping place for the ingress and egress of passengers, it

is the duty of the carrier to hold the car stationary while a passenger is making a reasonable effort to alight. And where the car is stopped at a place not intended for use as a passenger station and for another purpose than the admission and discharge of passengers, the carrier should not start the car while a passenger is alighting, in a case such as that depicted by the evidence of plaintiff where the passenger was leaving the car with the knowledge and consent of the conductor.

The demurrer to the evidence was properly overruled.

In the instructions asked by plaintiff the jury were authorized to find for her if they should believe that her fall was caused by the sudden start of the car while she was alighting and that she was alighting "while said car was at said point, either stopped, *or moving slowly.*"

The court struck out the italicized words and thereby precluded a recovery by plaintiff unless the jury should find the car was stationary when she attempted to alight. In instruction No. 4, given at the request of defendant, the jury were told "that the only negligence that is submitted to you for consideration in this case is that after the car was brought to *a full stop* . . . and while plaintiff was in the act of alighting therefrom, defendant's servants, operating the car, negligently caused . . . it to give a sudden and violent jerk thereby throwing plaintiff," etc. And in another instruction, given at the request of defendant, the jury were told "if you believe and find from the evidence that the plaintiff's injuries, if she sustained any injuries, were caused by her leaving or attempting to leave the car while the same was in motion, either before it stopped, or after it had stopped and started again, then the plaintiff cannot recover, and your verdict must be for the defendant."

The instructions asked by plaintiff are not in harmony with the rule applied by this court in *Bond v. Railroad*, 110 Mo. App. 1. c. 138, and the court did not err in refusing to give them. The gravamen of the action pleaded in the petition was negligence in suddenly starting a car that had been brought to a standstill before plaintiff started to alight. No rule is better settled than that which restricts a plaintiff to a recovery only on the cause pleaded. "He must recover upon the cause of action as alleged which is that the car was not in motion when he attempted to alight, but was suddenly started with a jerk that threw him off and caused his injury." [*Bond v. Railroad*, supra.]

As we shall hold, there would be in such case no material variance between *allegata* and *probata*, if the proof showed that the car had not been brought to a dead stop but had its speed reduced to an imperceptible or perfectly harmless forward motion, but the instructions of plaintiff, had they been given, would have authorized the jury to find for her even on the hypothesis that the forward motion of the car while she was attempting to alight was fast enough to make it a factor in causing her fall. The term "moving slowly" when applied to the speed of an electric street car might refer to any rate of speed less than eight or ten miles per hour. Plaintiff's petition precluded her recovery on any other hypothesis than that of an injury caused solely by the sudden start of the car and her instructions were erroneous for the reason that they enlarged the scope of her cause of action to include negligence in starting the car in a case where the forward motion of the car during the effort to alight could have been a co-ordinate factor in producing the injury.

But in the modification of plaintiff's instructions as well as in the giving of the instructions asked by defendant, the court erroneously went to the opposite extreme in holding plaintiff to recovery, if at all, only on the finding that the car had come to a dead stop and

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was in that condition when its sudden start threw her to the pavement. There is evidence in the record from which the inference would be reasonable that the car was moving so slowly its motion could not have had any effect on the alighting passenger. Still the instructions given by the court compelled a verdict for defendant even in such case. We considered an identical situation in *Green v. Railway*, 122 Mo. App. 1. c. 653, where we said: "Without qualification or exception, the instruction directs a verdict for defendant, should the jury find that plaintiff 'voluntarily attempted to step off the car while it was in motion.' This means that if the car had any motion at all, however slight, when plaintiff began her step to the ground, still she could not recover notwithstanding a sudden acceleration of speed might have been the immediate cause of her fall. It would be extremely harsh and technical should we say that the existence of an almost imperceptible motion when plaintiff's last step began would disprove the act of negligence charged. To have such effect, the motion of the car should be at a rate of speed that in some degree, though slight, would enhance the danger of the act. If less than this, the car for the purpose of alighting from it should be regarded as stationary. [*Forrester v. Railroad*, 116 Mo. App. 37.]"

Reaffirming the rule just stated and applying it to the case in hand, we must hold that in the instructions given, the court erroneously curtailed the scope of the cause of action pleaded and supported in the evidence. The error was prejudicial and the learned trial judge did right in granting a new trial.

The judgment is affirmed. All concur.

FLORENCE L. KELLEY, Respondent, v. KANSAS CITY, Appellant.

Kansas City Court of Appeals, January 16, 1911.

1. **APPELLATE PRACTICE: Evidence.** Where the appellate court finds nothing in the evidence to challenge credulity, but where plaintiff's account of her injury, caused by the negligence of defendant city in failing to maintain in proper repair a board sidewalk on one of its public streets, was a hypothesis of fact which the jury were entitled by the evidence to accept. *Held*, that the appellate court will not declare plaintiff's evidence wholly devoid of probative value on the ground that it is inconsistent with the physical facts of the situation.
2. **MUNICIPAL CORPORATIONS: Contributory Negligence: Sidewalks.** In an action for damages for personal injuries sustained by stepping into a hole in a sidewalk negligently left unrepaired by the city. *Held*, that plaintiff's conduct in conversing while walking along the street, and in not giving the sidewalk in question her undivided attention was not so negligent in law as to preclude recovery, providing plaintiff at the time was giving ordinary attention to her course.
3. **—: Negligence: Instructions: Sidewalks.** An objection that an instruction enlarged the issues made by the evidence, because it submitted to the jury the question whether or not the step in a sidewalk was defective. *Held*, hypercritical when the hypothesis of the entire instruction, and the contention of the plaintiff throughout the case was that the hole in the end of the board (into which hole plaintiff fell) together with the step under the hole constituted a dangerous defect.
4. **INSTRUCTIONS.** Where an instruction, when read as a whole, clearly and correctly defines the duty of defendant, it is not permissible to select isolated parts thereof, and infer that the jury disregarded the remainder, and were misled by what would be error in the selected part if it were not qualified by its context.
5. **MUNICIPAL CORPORATIONS: Negligence: Instructions.** An instruction asked by defendant was properly refused which told the jury that if the injury was received at a place where there was a step down in the sidewalk of which plaintiff knew, then it was her duty in passing along the point in such sidewalk to have exercised a higher degree of care than was required of her in passing along a sidewalk where there was no such step down, because this would have held plaintiff to the exercise of extraordinary care.

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Appeal from Jackson Circuit Court.—*Hon. Herman Brumback*, Judge.

AFFIRMED.

John G. Park, I. D. Hook and James W. Garner for appellant.

(1) The court should have sustained defendant's demurrer to the evidence, because: 1. The plaintiff's explanation of the cause of the accident is inconsistent with the physical facts. *Oglesby v. Railroad*, 177 Mo. 272; *DeMaet v. Fidelity, etc., Co.*, 121 Mo. App. 92. (2) Plaintiff was guilty of contributory negligence as a matter of law. *Wheat v. St. Louis*, 179 Mo. 572; *Coffey v. Carthage*, 186 Mo. 573; *Heberling v. Warrensburg*, 204 Mo. 604; *Diamond v. Kansas City*, 120 Mo. App. 185. (3) The court erred in giving plaintiff's instruction No. 1. It submitted an issue which was not supported by evidence. *Chenoweth v. Sutherland*, 129 Mo. App. 431. It imposed on the defendant a higher degree of care than was required of it. *Dunn v. Nicholson*, 117 Mo. App. 374. It did not impose on the plaintiff as high a degree of care as was required by law. It authorized the jury to indulge in a presumption that the plaintiff had exercised due care when she was not entitled to such presumption. *Woodson v. Railroad*, 224 Mo. 685; *Coffey v. Carthage*, 186 Mo. 573; *Grout v. Railroad*, 125 Mo. App. 552; *Schaub v. Railroad*, 133 Mo. App. 444; *Diamond v. Kansas City*, 120 Mo. App. 185.

Bird & Pope for respondent.

JOHNSON, J.—This is a suit to recover damages for personal injuries plaintiff alleges were caused by the negligence of defendant city in failing to maintain in proper repair a board sidewalk on one of its public

streets. The answer is a general denial and a plea of contributory negligence. A trial resulted in a verdict and judgment for plaintiff in the sum of twenty-five hundred dollars. Defendant appealed.

The injury occurred at 8:30 p. m. September 22, 1908, at the southwest corner of Twenty-third and Terrace streets in Kansas City. Plaintiff, who was fifty-one years old and weighed 220 pounds, had been visiting her married daughter who lived on Twenty-third street and was on her return home when she stepped in a hole at the end of one of the sidewalk planks, fell and was injured. Twenty-third street runs east and west, Terrace street north and south. There was a board sidewalk on the south side of Twenty-third street, ending at the curb line on the west side of Terrace street. The planks of this walk were laid crosswise on stringers which ran with the course of the street. There was also a board sidewalk on the west side of Terrace street, the end of which adjoined the walk on Twenty-third street in a way to make a continuous sidewalk around the corner. The planks of the Terrace street sidewalk were laid at right angles to those on Twenty-third street and the end plank was about on the south property line of Twenty-third street. Two long, wide boards, laid crosswise of Terrace street constituted the crossing for pedestrians over that street. The west end of this crossing was not at the end of the Twenty-third street sidewalk, but was placed just south thereof at the north end of the Terrace sidewalk. The hole in the end plank of that walk was at the north end of the plank and was in the course a pedestrian would take who, coming east on Twenty-third street, purposed to cross Terrace street on the plank crossing described. The west end of that crossing was much lower than the sidewalk and a plank step intervened. Plaintiff and a companion, walking east on Twenty-third street, came to this step and plaintiff stepped into the hole as she started to step down to the street crossing. In some way the heel of her shoe

caught in the edge of the hole causing her to lose her balance and fall down the step to the crossing. The end of the shoe heel where it caught in the hole was torn off. The hole was a decayed place in the board and its edges were irregular. Plaintiff testified: "I was thrown down this step. It seems my foot caught in a hole in the sidewalk and that threw me down and my foot went under me."

Plaintiff admits she and her companion conversed as they walked along but her testimony, as well as that of her companion, is that they were paying attention to the sidewalk but failed to see the hole on account of insufficient light. There was an arc lamp nearby but it was so placed that the hole was in a shadow and was not to be seen easily. Plaintiff's daughter had been living on Twenty-third street two or three months and plaintiff, who lived in another part of the city, had visited her frequently, but she had not noticed the hole in the sidewalk. She states that in going to her daughter's house she walked in the street and that only in returning did she use the sidewalk. This practice was due to the fact that being large and heavy she avoided going up steps but did not object to using them going down.

The petition alleges "that said defendant knew of said defective, unsafe and dangerous condition of said sidewalk and steps at said intersecting point long prior to the happening of the injuries herein complained of, and had notice in time to repair said defect or defects, long prior to said September 22, 1908, or could, by the exercise of ordinary care and caution and diligence, have known of the same long prior to said time, but failed and neglected to repair the same, and for a long time wrongfully and negligently maintained and permitted said sidewalk and steps at said point to be and remain in said unsafe and dangerous condition, which said condition was unknown to this plaintiff." . . . "While the plaintiff was in the exercise of ordinary care and

caution, and without plaintiff's having any knowledge of the defective, unsafe and dangerous condition of said sidewalk and steps, she stepped into one of said holes in said sidewalk at or near the top of said steps, and by reason thereof and said defective, unsafe and dangerous condition of said street and said sidewalk and steps at said intersection as aforesaid, she was caused to be thrown to the sidewalk and steps and street with great force and violence."

Three points are argued by defendant, viz.: First. That the demurrer to the evidence of plaintiff should have been given; second, that instruction numbered 1, given at the request of plaintiff, contains prejudicial error and, third, that the court erred in refusing to give one of the instructions asked by defendant. We shall consider these points in the order of their statement.

I. Defendant insists that plaintiff's account of her mishap is so inconsistent with the physical facts of the situation that, as a matter of law, we should declare it wholly devoid of probative value and, therefore, impotent to support the charge of negligence in the petition. On numerous occasions courts of last resort in this state have reversed judgments based on testimony found to be beyond the pale of reasonable belief but, as a rule, appellate courts refuse to substitute their views respecting issues of fact for those of the triers of fact in whom is vested by law the duty of deciding such issues, and they never weigh evidence in jury cases except for the single purpose of ascertaining whether or not it possesses any evidentiary weight.

We find nothing in the evidence of plaintiff to challenge credulity. One end of the step was under the protruding and defective end of the sidewalk plank and so close that it touched the under side of the plank at its south edge. It seems reasonable to say that in stepping into the hole plaintiff's foot reached and rested on the step underneath and her heel caught on the

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ragged edge of the hole. That would account for her fall and it was a hypothesis of fact the jury were entitled by the evidence to accept.

Further defendant argues that plaintiff's conduct should be pronounced negligent in law. We think it was a question of fact for the jury. Plaintiff was justified in assuming that the city had performed its duty to exercise reasonable care to provide and maintain a reasonably safe sidewalk for the use of pedestrians and that the way was free from dangerous defects. This presumption did not absolve her from the duty of making reasonable use of her senses for her own protection, but it did relieve her of any legal obligation to exercise more than ordinary care—such care as ordinarily careful or prudent persons in her situation would observe. She was not required to give the sidewalk her undivided attention and it was not negligence *per se* for her to converse with her companion. [O'Donnell v. City, 144 Mo. App. 155.]

There is no reason for judicial condemnation of the common practice, indulged by thousands of pedestrians every day, of conversing while walking on the sidewalk. One can talk or listen and give ordinary attention to his course.

II. The instruction of which complaint is made is as follows:

“If you find and believe from the evidence that West Twenty-third street and Terrace street, were on and prior to September 22, 1908, public streets and highways of the defendant, Kansas City, and within the corporate limits of said city, and that said streets intersect each other at right angles, and that at the southwest corner of said streets there was a wooden board sidewalk and wooden steps, and that said sidewalk and steps were used by the traveling public as a way, then the court instructs you that it was the duty of the defendant to keep said sidewalk and steps at said point

in a condition reasonably safe for the use of the public at night as well as by day, and the plaintiff, if she did not know to the contrary, had a right to presume that this duty had been performed. And if you further find and believe from the evidence that said sidewalk was, on September 22, 1908, in an unsafe and dangerous condition for travel thereon by the public and that a sufficient time had elapsed between the time the same became unsafe and dangerous (in case you find it was unsafe and dangerous), and the time of the injury (if any) to the plaintiff, for the city, by the exercise of reasonable diligence, that is, such care as an ordinary prudent person would exercise, under the circumstances, to have discovered and repaired the same prior to the time of the injury (if any), to the plaintiff, then the city was negligent in not discovering and repairing the same. And if you further find and believe from the evidence that the plaintiff was traveling along said sidewalk, and in the exercise of ordinary care, under the circumstances, and was, by reason of the unsafe and dangerous condition of said sidewalk (if you find it was unsafe and dangerous), caused to be thrown to said sidewalk and steps and injured, then you will find for the plaintiff, and assess her damages (if any) at such sum as the evidence shows is a full, fair and just compensation for the injuries (if any) sustained by her, considering their nature and character as shown by the evidence, and not exceeding the sum of \$20,000 which is the amount claimed by plaintiff in her petition."

The objection that, in submitting to the jury the question of whether or not the step was defective, the instruction enlarged the issues made by the evidence is hypercritical. There is no thought in the evidence of a defect in the step and the contention of plaintiff throughout has been that the hole in the end of the board, together with the step under the hole, constituted a dangerous defect. That is the hypothesis of the instruction and we do not believe the jury could have felt

authorized to find for plaintiff on any other ground than that of a defect in the sidewalk plank. We must give the jury credit for possessing an ordinary amount of common sense and should not infer that they would go outside of the evidence to place a strained construction on the language employed in the instructions of the court.

Further, the instruction is criticised on the ground that it "imposed upon the defendant a degree of care that exceeded the requirements of the law" in telling the jury "that it was the duty of the defendant to keep said sidewalk and steps at said point in such a condition reasonably safe for the use of the public," etc. The instruction must be read as a whole and when so read it clearly and correctly defines the duty of defendant, which was that of exercising reasonable care to maintain the sidewalk in a reasonably safe condition for public use. It is not permissible to select isolated parts of an instruction and infer that the jury discarded the remainder and were misled by what would be error in the selected part if it were not qualified by its context.

Other criticisms of this instruction have been considered and are found to be without merit.

III. Defendant asked the court to instruct the jury "that if they believe from the evidence that the injury received by plaintiff was received at a place where there was a step down in said sidewalk, and that plaintiff at the time and place knew there was such a step down, then it was the duty of plaintiff in passing along the point in such sidewalk to have exercised a higher degree of care than was required of her in passing along a sidewalk where there was no such step down."

The court properly refused that instruction. A "higher degree of care" means extraordinary care since the comparative adjective necessarily must refer to ordinary care. Plaintiff was required to exercise only ordinary care in going down the steps. Such care, doubt-

less, would prompt an ordinarily careful and prudent person of the age and weight of plaintiff to move more cautiously and with more attentiveness in descending steps than would characterize his progress along a level sidewalk, but in each instance his conduct would be the exercise of only reasonable care, since it would differ in no degree from that to be expected by a reasonably careful person in such situation. Just why plaintiff should be marked as one who should exceed in carefulness the theoretical "ordinarily careful and prudent person" is not apparent. She was required to conduct herself only in a manner demanded of a person of ordinary prudence in the circumstances of her situation.

The judgment is affirmed. All concur.

BLAINE MCGEE, Respondent, v. ST. JOSEPH RAILWAY, LIGHT, HEAT and POWER COMPANY, Appellant.

Kansas City Court of Appeals, January 16, 1911.

1. **APPELLATE PRACTICE: Instructions: Too Numerous.** Where the instructions offered by the defendant are too numerous for the purposes of the issues involved, such practice is calculated to confuse both the court and the jury, and thereby engender error. Hence, where the cause will have to be reversed in any event, the appellate court will not discuss those instructions offered by the defendant and refused by the trial court.
2. ———: **Evidence: Credibility of Witness.** In an action for damages for personal injuries caused by the alleged negligence of the defendant street car company, the appellate court will not pass upon the credibility of plaintiff's testimony where nothing is urged or can be urged to support the supposition that plaintiff could not have been injured in the manner that he claimed that he was, but that he lied about the facts.
3. **CARRIERS OF PASSENGERS: Instructions: Humanitarian Doctrine.** In an action for damages for personal injuries sustained by the negligence of defendant's motorman in running

down plaintiff who was diagonally crossing the street car tracks with his back to defendant's car, the recitation in the instruction given at plaintiff's request that defendant was liable if his motorman could have seen by keeping a vigilant outlook that plaintiff was approaching defendant's track, in time to have stopped the car, and negligently failed to do so, was a glaring misdirection to the jury, and serious error.

4. ———: **Contributory Negligence: Crossing Tracks.** A person who undertakes to cross the track of a street railroad, when an approaching car can be seen, by attempting to cross in front of a car, is guilty of contributory negligence.
5. ———: **Humanitarian Doctrine: Crossing Tracks.** In the absence of something in the conduct of a person who is guilty of contributory negligence in crossing a street car track, which indicates that he is unmindful of his surroundings, or regardless of them in intending to cross in front of a car, the motorman has the right to presume that he will stop without the danger line, and, if acting on that presumption, the motorman does not discover his peril until it is too late to stop the car, the company will not be liable for plaintiff's consequent injuries.
6. **INSTRUCTIONS: Curing Error.** While in another instruction, also given at plaintiff's request, the court declared the law correctly, this did not cure the error in giving the first instruction which contained a glaring misdirection, because the two instructions left it to the jury to say what was, and what was not, the law of the case.
7. **CARRIERS OF PASSENGERS: Humanitarian Doctrine.** Where the act of plaintiff, in going upon defendant's tracks without keeping a vigilant lookout for an approaching car from the rear, was such an act of contributory negligence as to preclude plaintiff's right to recover, unless his situation of peril was or could have been discovered in time for the motorman to have avoided striking him by the exercise of reasonable diligence, this is a case for the application of the humanitarian doctrine.

Appeal from Buchanan Circuit Court.—*Hon. C. A. Mosman, Judge.*

REVERSED AND REMANDED.

R. A. Brown for appellant.

Under the law and evidence plaintiff was not entitled to a verdict, and the demurrer offered by the defendant at the close of plaintiff's case, and again at the close of defendant's case, should have been given. Horn-

stein v. United Railways, 195 Mo. 440; Deane v. Transit Company, 192 Mo. 584; Brockschmidt v. Railroad, 205 Mo. 446; Moore v. Railroad, 176 Mo. 528; Cole v. Railroad, 121 Mo. 613; Hebler v. Railroad, 132 Mo. App. 554; Gabriel v. Railroad, 130 Mo. App. 636.

Charles C. Crow and John S. Boyer for respondent.

The court did not err in submitting the case to the jury. The evidence clearly made a case for the judgment of the jury and the demurrer was properly overruled. Waddell v. Railroad, 213 Mo. 8; Murphy v. Railroad, 138 Mo. App. 436; Zander v. Railroad, 206 Mo. 464; Cytron v. Transit Co., 205 Mo. 692.

BROADDUS, P. J.—The plaintiff's suit is to recover damages he sustained for an injury he received by reason of the alleged negligence of defendant.

The defendant is a corporation engaged among other things in operating street cars in the city of St. Joseph. On the 10th day of January, 1909, in the nighttime, plaintiff who was an employee of a steam railroad company, took passage on one of defendant's cars, being operated on Ninth street. The defendant has two tracks on this street which runs north and south. His destination was south to where the street intersects with Lafayette street. After the car had crossed the latter street and while it had just stopped or was slowing down to stop he got off. Thus far there is no particular dispute as to the testimony, but as to what occurred afterwards the evidence is very conflicting.

As the plaintiff's right to recover depends almost entirely upon the facts that he testified to; we state them to be as follows: He was asked how long it was after he got off the car until he was injured. His answer was: "Well, just a few moments. About two or three minutes, I suppose." His description of how he became injured is as follows: "I got off on the south side of Lafayette street, and my home is on the north

side of Lafayette street, and I started diagonally across the street, across Ninth and Lafayette street and I walked about—as near as I can estimate the distance, thirty-five—between thirty-five and fifty feet, and when I was in the middle of the east track—the cars run north on there—and I was in the middle of the street I heard the buzz or sound of a car, and I turned my head and then as I turned around the car was on me, and I became unconscious; that is all I can remember until I came to in the hospital.”

He stated that no bell was rung or gong sounded by the car that struck him, and no warning of any kind given of its approach; that the car he alighted from proceeded on its way south, and that when he started across the tracks he looked down the track and around to see if anything was in his way, but that he did not look particularly to see a car, but to see if anything was going to run over him. He stated that it was a habit of railroad men to keep a lookout. It was shown that the motorman could have seen the plaintiff on the track for a distance of two blocks away. The rate of speed the car was going at the time was shown to be twelve or fifteen miles an hour. The ordinance of the city regulating the duties of a motorman and the rate of speed of the cars was in evidence. The ordinance makes it the duty of the person or corporation to cause the gong on its cars to be sounded in quick succession on approaching any team, carriage or person, and upon approaching any street crossing within the city. The rate of speed within the city limits is not to exceed ten miles an hour.

The evidence of defendant tended to show that plaintiff alighted from the south-bound car near the north line of Lafayette street and while the car was in motion, that he pulled the collar of his coat up around his ears, and ran across the east track directly in front of defendant's north-bound car; that as soon as he came in sight the motorman called to him and did all in his

power to stop the car; and that the north-bound car was traveling at a rate of speed not exceeding five or six miles an hour, and the gong was sounded in quick succession as it approached and was passing the south-bound car.

The jury returned a verdict for plaintiff for the sum of \$750 upon which judgment was rendered, and defendant appealed.

At the close of plaintiff's testimony and also at the close of all the testimony in the case the defendant asked the court to direct a verdict for the defendant, which the court refused.

The court among others gave the following instruction at the instance of plaintiff: "The court instructs the jury that if you believe from the evidence in this cause that defendant is the owner of street car tracks and street cars operated in the city of St. Joseph, Missouri, and especially a double track on Ninth street between Olive street and Penn street in said city of St. Joseph; and that defendant operated its cars on said street on January 10th, or early in the morning of the 11th of said month, and that one car was traveling south and another north, and that the plaintiff was a passenger on the car traveling south on said Ninth street, and when said car reached a point at or near the south line of Lafayette street, plaintiff left said car and started diagonally northeast across the street where Lafayette and Ninth street intersect; and you further believe from the evidence that there was a car traveling north on the east track of defendant company's railway, and that plaintiff did not see said car or know of the approach of same, and that plaintiff was walking northeast on or approaching said east track with his back to said north-bound car and was not aware of the danger of being struck by said car; and you further believe from the evidence that there was a motorman and conductor in charge of said north-bound car in the employ of defendant company, and that plaintiff while so

walking northeast was so far away from the north-bound car, that by keeping a vigilant lookout for persons on or approaching the defendant company's track, the said motorman or employee of defendant company could have seen plaintiff walking northeast towards or on said railways track in time to have stopped the car by the exercise of ordinary care, and have thereby avoided injury to plaintiff, and negligently failed to do so, then your verdict in this cause must be for the plaintiff."

The defendant asked twenty-two instructions. As the cause will have to be reversed, as will be shown hereafter, we will say in the beginning that we will not discuss those offered by defendant and refused by the court, for the reason that they are too numerous for the purposes of the issues involved. The practice of submitting so many unnecessary instructions can serve no good purpose. On the contrary the tendency is bad, in that, they are calculated to confuse both the court and the jury and thereby engender error, which the appellate courts are asked to correct at the expense often of open-handed justice.

In the first place it is strenuously contended that the court committed error in not sustaining defendant's demurrer to the plaintiff's case. The argument to support this view is that, all the credible evidence goes to show the plaintiff was not injured as he testified he was, but that in fact he got off the south-bound car without looking for a car coming from the south, and immediately passed around its rear end and stepped in front of the one going in the opposite direction, and was thus struck and injured.

The premises upon which we are asked to support this view are based upon the proposition that it is the duty of this court to pass upon the credibility of plaintiff's evidence, that is to say, he did not testify to the truth. Nothing is urged or can be urged to support the supposition that he could not have been injured in the

manner he claimed that he was, but that he lied about it. It is too well settled law and repeated often and often by this and every other appellate court of this state that it is not within the province of the appellate courts to pass upon the credibility of a witness. The court under the testimony was bound to submit the case to the jury, but it had the right afterwards to set it aside for the reasons which appellant urges in this court.

Said instruction one, given at the instance of plaintiff, contains in our opinion a serious error. The recitation therein that the defendant was liable if its motorman could have seen by keeping a vigilant lookout that plaintiff was approaching defendant's track in time to have stopped the car and negligently failed to do so, was a glaring misdirection to the jury. The law is, that a person who undertakes to cross the track of a street railroad when an approaching car can be seen, by attempting to cross in front of the car is guilty of contributory negligence, and in the absence of something in the conduct of such person that indicates that he is unmindful of his surroundings, or regardless of them in intending to cross in front of the car, the motorman has the right to presume that he will stop without the danger line, and that if acting on that presumption the motorman does not discover his peril until it is too late to stop the car the company will not be liable for his consequent injuries. *Reno v. Railway Co.*, 180 Mo. 470; *Roefeldt v. Railway*, 180 Mo. 554; *Keele v. Railway*, 131 S. W. 730.] There are many cases of like import rendered by this court and the St. Louis Court of Appeals.

While in instruction two, given for the plaintiff, the court declares the law correctly, we do not think it cured the error. The jury were left to determine which should guide them in making a verdict. In other words the two instructions left it to the jury to say what was

and what was not the law of the case. The dilemma was almost if not as great as if the instructions had been contradictory or conflicting. It is therefore impossible to tell whether the jury took a correct view of law in their deliberations.

The appellant contends that under the evidence this is not a case for the application of the humanitarian doctrine. But we think it is, otherwise the plaintiff has no case, for his act in going upon the defendant's tracks without keeping a vigilant lookout for an approaching car from the rear was such an act of contributory negligence that precluded his right to recover, unless his situation of peril was or could have been discovered in time for the motorman to have avoided striking him by the exercise of reasonable diligence.

We have considered appellant's objection to said instruction numbered two, and to the authorities which our attention has been called to the question, but we find that the said instructions are strictly in accord with said authorities and are not justly subject to criticism.

The court gave four instructions for defendant which we believe fully covered the law of the case. Number one was a clear expression of the law and as such, was in conflict with number one to which we have called attention, and which of itself would be sufficient ground for a reversal of the cause. We refrain from comment on the others refused for the reason stated. The cause is reversed and remanded. All concur.

SIMEON TEWKSBURY, Respondent, v. METROPOLITAN STREET RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, February 13, 1911.

1. **PERSONAL INJURY: Street Car: Electric Pole.** Where a street railway company operated by electricity, plants its poles for carrying the wire so close to the tracks as to endanger the safety of the conductor in attending to the duties devolved upon him, it is liable for an injury which he receives by being struck by the pole as the car passed.
2. ———: ———: ———: **Negligence: Contributory Negligence: Assumption of Risk.** Where a street railway company operated by electricity, planted its iron poles within fifteen or eighteen inches of the track, and where a conductor, while the car was running, was endeavoring, by leaning out beyond the car, to throw the trolley rope around the corner of the car so that it would hang over the rear of the car, which was its proper place, and was struck by the pole and injured. *Held*, that the company's negligence and the conductor's contributory negligence and assumption of risk were all questions for the jury.

Appeal from Jackson Circuit Court.—Hon. James H. Slover, Judge.

AFFIRMED.

John H. Lucas and Boyle & Howell for appellant.

(1) The court should have sustained defendant's demurrer to the evidence. The plaintiff assumed the risk as incident to his employment. He had knowledge of the location of the poles and was guilty of contributory negligence in leaning his head and body outside the car. *Drake v. Railroad*, 173 N. Y. 466; *Blackstone v. Railroad*, 38 S. E. Rep. 70; *Railroad v. Head*, 92 Ga. 723; *Railroad v. Kath*, 232 Ill. 126, 15 L. R. A. (N. S.) 1109; *Moore v. Railroad*, 119 Tenn. 710, 109 S. W. 497.

(2) Plaintiff's instruction numbered 1p was erroneous. It is not predicated upon all the facts in the case, and assumes that the way plaintiff attempted to adjust the trolley rope was the only way in which it could be done, and that it was necessary then and there to do the way he did, in the manner he did it. Cases cited in 1; Fugler v. Boothe, 117 Mo. 475; Lucey v. Oil Co., 129 Mo. 32. (3) Plaintiff's instruction, numbered 6p, was erroneous; it ignores the fact that plaintiff had knowledge of the location of the pole and its proximity to the tracks, and inferentially tells to the jury, that plaintiff had no knowledge thereof. The language of the instruction is further so vague and indefinite as to leave the matter in such light before the jury as to leave them to conclude therefrom that the mere setting of the pole in close proximity to the track made the defendant liable, regardless of the knowledge of plaintiff of the condition or location thereof. Rigsby v. Oil Co., 115 Mo. App. 297; Lee v. Railroad, 112 Mo. App. 372; Cordage Co. v. Miller, 12 Fed. 495; also cases cited under 1; Renfro v. Railroad, 86 Mo. 302; Price v. Railroad, 77 Mo. 508. (4) The court erred in refusing to give defendant's instruction numbered C; this instruction submitted the issue of defendant's defense fairly and fully, and should have been given. Shore v. American Bridge Co., 111 Mo. App. 278; cases cited in 1.

Botsford, Deatheridge & Creason for respondent.

(1) It was no part of plaintiff's duty to make a special examination to ascertain the proximity of the poles to the car. He had the right to assume that defendant had placed them at a safe distance from the track so they would not strike him while in the performance of his ordinary duties. He did not assume the risk of defendant's negligence. Murphy v. Railroad, 115 Mo. 116; Young v. Oil Co., 185 Mo. 634; Smedley v. Railroad, 118 Mo. App. 103; Lee v. Railroad, 195

Mo. 400; Devlin v. Railroad, 87 Mo. 545; Waldhier v. Railroad, 87 Mo. 37; Huhn v. Railroad, 92 Mo. 447; Hamilton v. Mining Co., 108 Mo. 375; Whipple v. Railroad, 35 Atl. Rep. (R. I.) 305; Railroad v. Davis, 92 Ala. 300. (2) Under the evidence in this case, it was for the jury to say whether or not plaintiff was guilty of contributory negligence. Murphy v. Railroad, 115 Mo. 116; Young v. Oil Co., 185 Mo. 634; Smedley v. Railroad, 118 Mo. App. 103; Whipple v. Railroad, 35 Atl. Rep. 305. See also other cases cited under point 1.

ELLISON, J.—Plaintiff was an employee of the defendant as a conductor on one of its street railway cars. He was injured while in such service and brought this action for damages. He recovered judgment in the trial court.

It appears that defendant's street railway is operated by electricity and that what is called a trolley pole extending to the overhead wire, has a rope reaching from the end of the pole to the rear vestibule, where it is tied to the car. This rope would sometimes get loose or would hang so loosely that it would be blown by the wind around on the side of the vestibule and get in the way of incoming or outgoing passengers, and it was the duty of conductors to go to the door or opening in the vestibule and throw it around the end of the car so that it would hang in the rear. The electric wires were supported by iron poles on each side of the track, and the charge of negligence is, that at the point where plaintiff was hurt, these were placed too close to the track, so close that it was unsafe and dangerous for one to lean out from the car while in motion.

The evidence showed that the distance of the iron pole from a passing car is seventeen or eighteen inches. It further showed that while the car was running north on the east track, plaintiff observed that the rope had gotten around onto the east side of the vestibule, and he took hold of it, leaned out with his head and body

so as to be able to throw it around the end of the roof of the car to its proper position. While so engaged, being rapidly carried by the running car, his head and shoulder struck one of these upright iron poles with such force as to knock him from the car and inflict serious and permanent injury.

The defense may be said to be two-fold; contributory negligence and assumption of risk. The evidence showed that plaintiff had been in defendant's services as a conductor for nearly a year. He had, of course, seen the poles and observed their position, but it had not occurred to him that they were in dangerous proximity. He was endeavoring to throw the rope around the end of the car in the way all of the conductors on the line did it. "It was the way I had always done it, and the way I was instructed by the man that learned me."

The trial court was right in concluding that the questions of defendant's negligence and plaintiff's contributory negligence and assumption of risk, were for the determination of the jury. Neither appeared so clear and indisputable as to authorize a declaration as a matter of law. [Murphy v. Railroad Co., 115 Mo. 111; Young v. Oil Co., 185 Mo. 634; Lee v. Ry. Co., 195 Mo. 400.] The first of these cases is much like the one under consideration. There, an engineer got out of his cab onto the side of the tender and was attempting to tighten a nut so as to stop a leak. As the train passed over a road crossing he struck the end of a cattle-guard fence and was knocked off. He knew the way the fences were built, but had not had his attention called to their danger. It was held that the question of negligence on the part of the railway company and contributory negligence and assumption of risk on the part of the engineer, were for the jury.

The same view is taken in similar cases arising in the courts of other states. [Whipple v. Ry. Co., 19 R. I. 587; Ry. Co. v. Davis, 92 Ala. 300; Ry. Co. v. Man-

sell, 138 Ala. 548; Nugent v. Ry. Co., 80 Me. 62; Kearns v. Ry. Co., 66 Iowa 599; Ry. Co. v. Russell, 91 Ill. 298; Ry. Co. v. Thompson, 210 Ill. 228.] There cases involve obstructions such as telegraph poles and the like so near the track as to cause injury to employees. They afford ample support to the ruling of the trial court.

Criticism is made of plaintiff's first and sixth instructions, but we think it not well founded. The first one does not assume things in issue; nor does the sixth. When the latter is read in connection with the seventh, it will be seen that the jury could not have been misinformed, misled or confused. And when all the instructions are considered, there is no room left for a supposition that the jury was not given a full understanding of the issues involved. The judgment is affirmed. All concur.

MARIE FORSTER, Respondent, v. KANSAS CITY,
Appellant.

Kansas City Court of Appeals, January 16, 1911.

1. **MUNICIPAL CORPORATIONS: Personal Injury: Sidewalks:**
Instruction: Duty of City. In an action against a city for injuries resulting from falling on a sidewalk, it is error to instruct that it is the duty of the city to keep its walks in a reasonably safe condition. Such instruction should be that the duty is to make the effort that ordinary prudent persons would make to keep the walks in a reasonably safe condition. But such error is cured if followed by a proper qualification of the city's duty.
2. ———: ———: ———: **Pedestrians: Reasonable Care.** A pedestrian along one of the city's sidewalks, while he should not be heedless, is not required to assume that he is treading a dangerous and unsafe walk.

Appeal from Jackson Circuit Court.—*Hon. Herman Brumback*, Judge.

AFFIRMED.

John G. Park, James W. Garner, Ingraham D. Hook and A. F. Smith for appellant.

(1) There was not sufficient proof of negligence to support a verdict; if there was plaintiff was herself negligent. (2) The court erred in giving plaintiff's first instruction. Said instruction erroneously imposed the absolute duty upon the city to keep said sidewalk reasonably safe. *Dunn v. Nicholson*, 117 Mo. App. 374. Said instruction erroneously told the jury that the plaintiff could blindly rely on defendant's duty to keep said sidewalk safe. *Coffey v. Carthage*, 186 Mo. 573; *Grout v. Central, etc., Co.*, 125 Mo. App. 552; *Schaub v. Railroad*, 133 Mo. App. 444; *Diamond v. Kansas City*, 120 Mo. App. 185. Said instruction permitted a recovery for defects not resulting from negligence. (3) The court erred in refusing to give defendant's instructions properly submitting the issue of contributory negligence. (4) The court improperly submitted the issues as to plaintiff's injuries. A finding as to part of said claimed injuries was based on conjecture. *Byerly v. Consolidated, etc., Co.*, 130 Mo. App. 593; *Smart v. Kansas City*, 91 Mo. App. 586. The court refused to give instructions more fairly submitting those issues. (5) The plaintiff offered certain evidence incompetent unless subsequently connected by other evidence, and failed to offer such other evidence. *Smith v. Sedalia*, 182 Mo. 1. (6) The court erroneously admitted evidence of subsequent repairs, and of conclusions as to insufficient light.

Bird & Pope for respondent.

ELLISON, J.—This action is for personal injury received by plaintiff in falling upon one of the sidewalks in the streets of Kansas City, which is charged to have been negligently kept in an unsafe and dangerous condition. The judgment in the trial court was for the plaintiff.

Since the verdict was for the plaintiff, we will assume the facts of the case to be as the evidence in her behalf tends to prove them. It appears that she was walking eastwardly, along Twelfth street, after dark, where it was being repaired. That cobble stones were piled three or four feet inside the curb separating the walk from the street proper, but leaving ample walking space of from four to five feet wide. The walk was constructed of granitoid blocks in hexagon shape, and many of these were broken so as to leave a somewhat uneven surface. That just east of the door of a restaurant there was a hole or depression in the walk from four to six inches in depth. She stepped into this depression and caught the toe of her shoe under one of the broken blocks, which caused her to fall violently, first striking her knees, and then full length.

Allowing credit to the evidence in her behalf, she received injuries of a painful and distressing character, so much so that there can be no reasonable objection made to the amount of the verdict.

We have gone over the evidence and find it was ample to justify the court in overruling defendant's demurrer thereto. It is only by leaving out of consideration much of what was testified to in her behalf that any ground can be found to support the insistence that a case was not made for the determination of the jury; and we pass to the instruction to which objection has been made. Number one, as claimed by defendant, does submit, in its first words, a degree of care of the city's streets, much higher than is justified by the law. Its wording, considering that part of it alone, put an absolute duty on defendant to keep its streets and walks reasonably safe; the word "absolute" was not used, but that is the effect of the words which are used; whereas the duty is to make a reasonable effort to keep them reasonably safe. [Howard v. New Madrid, 127 S. W. Rep. 630; Dunn v. Nicholson, 117 Mo. App. 374.] This is recognized as the law in Garard v. Coal Co., 207 Mo.

242; but in that case, the objectionable degree of care stated on the part of the coal company was followed by a specific statement of what the care should be, viz., a reasonable effort. So, in this instruction, we find that notwithstanding the general assertion in the first part that it was "the duty of defendant" to keep its streets in reasonable repair, it is afterwards stated that such duty consisted in an "exercise of reasonable diligence, that is, such care as an ordinary prudent person would exercise."

This instruction is further criticised in that it asserts that plaintiff had a right to presume the walk was in reasonably good condition when she knew it was not. But the testimony in her behalf was to the effect that she did not know it, and the instruction required her to be in the exercise of ordinary care.

Complaint is made of the refusal of defendant's instruction "B." It relates to a lack of care on plaintiff's part, that is to say, to her duty to use her senses in passing along the street to discover and avoid defects. In our opinion, the instruction imposed more caution and watchfulness on plaintiff than can reasonably be expected of the ordinary careful pedestrian. Such persons should not, of course, be heedless, but neither should it be required of them to consider that they are treading a dangerous and hazardous way when on the sidewalks of a city. [Heberling v. Warrensburg, 204 Mo. 604; DeCourcy v. Construction Co., 140 Mo. App. 169.] But whatever may be the justification of defendant's complaint, it is all cured by instruction No. 2, given in its behalf, which required to be found that plaintiff was not guilty of any negligence contributing to her fall even though defendant may have been negligent.

Nor do we discover any appreciable error in the rulings on evidence. It will not do to say, as does defendant, that there was no evidence connecting plaintiff's nervous condition and interal injuries with which

she is afflicted, with the fall on the walk. It would be an inexcusable invasion of the province of the jury to say that such matters should have been decided by the court, by refusing to submit them.

We note some other points of objection to the trial including that as to an arc light, and the general conclusion that there has not been a fair trial. We do not so consider the case, and believe that defendant's view of it, as intimated above in another connection, is the result of shutting out of view important evidence and legitimate inference in plaintiff's behalf.

The judgment should be affirmed. All concur.

LOUIS A. LAUGHLIN and LOUIS S. KENWORTHY.
Appellants, v. EXCELSIOR POWDER MANUFACTURING COMPANY and KANSAS CITY SOUTHERN RAILWAY COMPANY, Respondents.

Kansas City Court of Appeals, January 30, 1911.

1. **ATTORNEYS: Lien: Client's Release of Joint Tortfeasor.** Plaintiffs, two practicing attorneys, brought this suit under the provisions of section 965, R. S. 1909, to recover an attorney's fee from the two defendant joint tortfeasors, a railroad and a powder company respectively, who had injured plaintiff's client. Pursuant to a contract providing that should their client settle his claim personally, his attorneys should be entitled to an equal fee, the plaintiff attorneys had previously brought suit against the powder company alone. Subsequently, their client compromised with the railroad company. The powder company then pleaded the client's release of the railroad company as a bar to the action against itself whereby said action was dismissed. *Held*, in the action for attorney's fees, that the trial court did not err in sustaining the separate demurrer of the powder company.
2. ———: ———: **Filing of Suit.** The filing of suit dispenses with the necessity of giving the notice of lien required by section 96, R. S. 1909, in respect to attorney's fees.

Laughlin v. Powder Mfg. Co. and Railroad.

3. ———: ———: Release of One Joint Tortfeasor. Although any act of defendant which destroyed the attorney's lien after it had attached to the cause of action made said defendant liable to the attorneys in an independent action, nevertheless the act of the defendant powder company in pleading the release given to the railroad company as a bar to the action against itself, was not such an act as to make it liable. The rule that where a principal profits by an unauthorized contract of his agent, he having enjoyed a benefit therefrom, must take the contract *eum onere*, does not apply in any sense to joint tortfeasors who do not stand in any contractual or confidential relations with one another, but who are jointly and separately liable whether they acted in concert or independently.
4. ———: ———: ———. A valid release of one joint tortfeasor releases all for the reason that the injured party having but one indivisible cause of action, in receiving satisfaction of part of his demand, satisfies the whole.
5. ———: ———: ———: Estoppel. When plaintiff's client settled his demand against the railroad company, one of two joint tortfeasors, he confessed that he had no cause of action against the powder company, the other joint tortfeasor, and would be estopped from repudiating that confession. Since the rights of plaintiff attorneys are derived from their client, in the absence of any allegation of fraud on the part of their client, they likewise are estopped.

Appeal from Jackson Circuit Court.—*Hon. Herman Brumback*, Judge.

AFFIRMED.

B. D. Davis for appellants.

(1) By filing the suit defendant powder company was charged with notice of the attorneys' lien on the cause of action. *Taylor v. Railroad*, 207 Mo. 495. (2) Any act of said defendant which destroyed the attorney's lien after it attached to the cause of action made said defendant liable to the attorneys in an independent action. *Yonge v. Transit Co.*, 109 Mo. App. 235; *Taylor v. Transit Co.*, 198 Mo. 715. (3) By pleading the release of the Kansas City Southern Railway Company as a bar to the further prosecution of the suit and

thereby electing to avail itself of the provisions of that contract, the defendant powder company took the benefit conferred by the release *cum onere*. To use a homely phrase, it must take the bitter with the sweet. Every benefit is to be enjoyed *cum onere*. *Mundorff v. Wickersham*, 63 Pa. St. 89, and cases cited.

Kinealy & Kinealy for respondents.

(1) No cause of action is stated in the petition because it does not allege any violation by defendant Powder Company of any right of the plaintiffs, and these are the essentials of a "cause of action." *Litton v. Railroad*, 111 Mo. App. 140. (2) The attorney's lien statute throws liability only on the defendant or proposed defendant who settles the client's cause of action. 1 R. S. 1909, sec. 965. (3) Thomas, having accepted compensation for his injuries from the railroad company, the law conclusively presumes that it "occasioned the whole injury." *Hubbard v. Railroad*, 173 Mo. 249.

JOHNSON, J.—Plaintiffs, practicing lawyers in Kansas City, brought this suit under the provisions of section 965, Revised Statutes 1909, to recover an attorney's fee of the defendants, the Excelsior Powder Manufacturing Company and the Kansas City Southern Railway Company. The defendants separately demurred to the petition, both demurrers were sustained, and plaintiffs appealed.

Material facts alleged in the petition are as follows: A train porter employed by the defendant Railway Company was injured, while on duty, by an explosion of powder and, claiming that his injury was caused by the negligence of both defendants, employed plaintiffs to prosecute his cause of action. The contract of employment was in writing and by its terms plaintiffs were to receive as compensation for their services

"fifty per cent of whatever amount said attorneys obtain in settlement of said claim either by suit or compromise." Further, it was agreed "that in case said first party (the client) shall settle or compromise said claim otherwise than through said attorneys, then said attorneys shall be entitled to a fee equal to that received by said first party, but said fee shall, in no event, be less than one hundred dollars."

Pursuant to this contract plaintiffs, on November 20, 1908, commenced a damage suit for their client in the circuit court of Jackson county against the defendant Powder Company alone and caused summons to be issued and served. In February, 1909, plaintiff "compromised and settled and released the cause of action upon which said suit was brought, and without the knowledge or consent of these plaintiffs, by receiving therefor the sum of sixty-five dollars from the said Kansas City Southern Railway Company." Afterward the Powder Company pleaded this release as a bar to the pending action and "such proceedings were had in said suit that it was dismissed because of said release." It is not claimed that notice of lien was served by plaintiffs on either of the present defendants.

The sole assignment of error in the brief of plaintiffs is that "the court erred in sustaining the separate demurrer of defendant, Excelsior Powder Manufacturing Company." Plaintiffs appear to have abandoned their demand against the Railway Company and we shall confine our inquiry to the only error assigned and discussed in the briefs.

The filing of suit against the Powder Company dispensed with the necessity of giving the notice of lien required by section 965, Revised Statutes 1909 (Taylor v. Railway, 207 Mo. 495), and we sanction the contention of plaintiffs that "any act of said defendant which destroyed the attorney's lien after it attached to the cause of action made said defendant liable to the attorneys in an independent action." [Yonge v. St.

Louis Transit Co., 109 Mo. App. 235; Taylor v. Transit Co., 198 Mo. 715; Curtis v. Railway, 118 Mo. App. 341.] But we do not accept as sound the further proposition that "by pleading the release of the Kansas City Southern Railway Company as a bar to the further prosecution of the suit and thereby electing to avail itself of the provisions of that contract, the defendant Powder Company took the benefit conferred by the release *cum onere*."

When a principal profits by an unauthorized act or contract of his agent, the law imposes on him the burdens of the act or contract, not so much on the ground of implied authority as on "the more reasonable ground that the party having enjoined a benefit must take it *cum onere*." [Mundorff v. Wickersham, 62 Pa. St. 89.] Plaintiffs rely on this rule but we think it has no present application. In no sense do joint tortfeasors stand in any contractual or confidential relation to each other. They are jointly and separately liable whether they act in concert or independently. [Hubbard v. Railway, 173 Mo. l. c. 256.]

In a joint tort each is considered as sanctioning the acts of the others, thereby making them his own. Therefore, each is liable for the whole damage and there can be no separate estimate of the injury committed by each. The injured person has but one cause of action and while he may prosecute his action against all or only one of the wrongdoers he cannot split his cause. A valid release of one tortfeasor releases all for the reason that having but one indivisible cause of action a plaintiff in receiving satisfaction of part of his demand satisfies the whole, unless he should be permitted to split his cause which, as we have said, is a thing the law will not permit him to do.

And, further, the release of one tortfeasor operates as an estoppel of the plaintiffs to deny the liability of

the one released. [Tompkins v. Railroad, 4 Pac. Rep. 1165.] "The law considers that the one who has paid for the injury committed the whole trespass and occasioned the whole injury and that he has, therefore, satisfied the plaintiff for the whole injury which he received." [Kilpatrick v. Hunter, 24 Me. 18.]

"It does not lie in the mouth of such plaintiff to say he has no cause of action against one who paid him for his injuries, for the law presumes that the one who paid committed the whole trespass and occasioned the whole injury." [Hubbard v. Railway, supra.]

When plaintiff's client settled his demand against the Railway Company, he solemnly and conclusively confessed that he had no cause of action against the Powder Company. He would be estopped from repudiating that confession and if he made the settlement in good faith and not fraudulently for the purpose of defrauding his attorneys, they, likewise, are estopped from ascertaining that he had a cause of action against the Powder Company. [Curtis v. Railway, supra.] There is no suggestion of such fraud in the petition and we must hold that plaintiffs are not entitled to collect their fee from the Powder Company. Their rights are derivative and are no greater than their source, viz., the cause of their client. The judgment is affirmed. All concur.

FRED J. GOULD, Respondent, v. JOHN P. St. JOHN
et al., Appellants.

Kansas City Court of Appeals, January 16, 1911.

1. **AGENCY: Real Estate: Division of Commission.** If real estate agents having lands for sale for other parties contract with another agent agreeing to give him "one-half of all gross profits made by us in the sale of any real estate to customers brought or sent to us by you," they are liable to such agent who produces a buyer who makes the purchase of such agents
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2. ———: ———: **New Trial: Second Appeal.** Where a new trial was granted to a defendant on account of the evidence not preponderating in favor of the plaintiff, and an appeal taken from that order to an appellate court which sustained the trial court, and on the second trial additional evidence is had in the plaintiff's favor, making a case for the jury, and a verdict is again rendered for plaintiff, a second new trial should not be granted on the ground of the weight of evidence.
3. ———: ———: ———: **Instructions.** Instructions which are liable to mislead or which call special attention to one phase of the evidence, are properly refused.

Appeal from Morgan Circuit Court.—*Hon. W. H. Martin*, Judge.

AFFIRMED.

Hazel, Edwards & Lay for appellant.

(1) The demurrer offered by the defendants at the close of plaintiff's case should have been sustained. Under the evidence the plaintiff had signally failed to make a case. While the law protects the rights of an agent to recover his commission, still, on the other hand the agent must do certain things and bring himself within the rule. He, the agent, must be the procuring cause of the sale. He must produce a purchaser who is ready, willing and able to buy. *Hayden v. Grillo*, 35 Mo. App. 647; *Stinde v. Scharff*, 36 Mo. App. 15; *Christensen v. Wooley*, 41 Mo. App. 53; *Hayden v. Grillo*, 42 Mo. App. 1; *Zeidler v. Walker*, 41 Mo. App. 118; *Ramsey v. West*, 31 Mo. App. 676. And the agent must have been, at least, the procuring cause of the sale being made. It is not sufficient that he be one of the causes of the sale. He must be the proximate and direct cause of the sale being made. *Crowley v. Somerville*, 70 Mo. App. 376.

(2) Error was committed by the trial court in allowing conversations and correspondence had between plaintiff and various other parties, such as *Lucas* and *Waldeck*, to be admitted in evidence. These parties

were strangers to the suit of Gould v. St. John and Noyes, and to the contract and transaction involved in that case.

Scott J. Miller for respondent.

(1) The appellants in this case have had one new trial, on account of the insufficiency of the testimony to support the verdict, and because the verdict was against the weight of the testimony (207 Mo. 623); and under our statute they are not entitled, on a second trial, to urge this point again. Sec. 801, R. S. 1899, and authorities thereunder cited. (2) The court did not err in overruling the demurrer offered by appellants at the close of plaintiff's case, and at the close of the entire case. If there was any competent testimony offered, the case must be submitted to the jury. *Schermerhorn Bros. v. Herold*, 81 Mo. App. 461; *Pauck v. Company*, 159 Mo. 467. (3) A demurrer to the evidence implies that, conceding the truth of everything plaintiff intends to prove with all favorable inferences which may fairly be drawn from it, there is still no substantial testimony to warrant a verdict in favor of plaintiff. *Buckley v. Kansas City*, 156 Mo. 16. (4) In this case, with the additional testimony offered, positive in its nature, there was an avalanche of testimony in favor of plaintiff's contention and defendants' defense was completely routed. Therefore, there was no testimony, worthy of consideration, against plaintiff's contention. (5) Gould was the moving cause. *Leonard v. Roberts*, 36 Pac. Rep. 882; *Loyd v. Mathews*, 51 N. Y. 124; *Lincoln v. McClatche*, 36 Conn. 136; *Crone v. Trust Co.*, 85 Mo., 601; *Carter v. Webster*, 79 Ill. 346.

ELLISON, J.—Plaintiff's action was brought to recover commission on the sale of real estate. He alleges that defendants were agents engaged extensively in the sale of real estate and that they, desiring the as-

assistance of plaintiff, entered into the following contract with him, viz.:

"Fred J. Gould, Versaillies, Mo.

"Dear Sir:—We will give you one-half of all the gross profits made by us in the sale of any real estate to customers brought or sent us by you. When the party is sent us, you must give them a letter of introduction, or otherwise notify us, before such sale is made that such buyer is your customer. We will pay you your share in each sale as soon as the same is completed. You to transact this class of business in this county solely through our firm. You to bear your own expenses; we to bear ours; this arrangement to be terminated at the will of either of us, but such termination not to interfere with any deal on hand, or otherwise made.

Very truly yours,

ST. JOHN & NOYES.

"I hereby accept the above conditions and will use my best efforts for the success of the undertaking.

FRED J. GOULD."

There was a judgment for plaintiff in the trial court.

This is the second appeal of the case. At a former trial the verdict and judgment was for plaintiff and it was set aside and a new trial granted. From the order granting the new trial plaintiff appealed to the Supreme Court, where the order was affirmed. The cause was then again tried and this appeal taken. It was appealed to this court on account of the recent increase of jurisdiction bringing it within the pecuniary limit of cases appealable to this court.

Both trials of the case took a wide range in matter of evidence and the opinion of the Supreme Court (207 Mo. 619) contains a complete statement of the claim of the respective parties, as well as a detailed recitation of the evidence bearing upon these claims. We need not

set them out, but refer to the report of the case just cited for its complete history. In the second trial of the case there was additional testimony in plaintiff's behalf which, in the opinion of the trial court, relieved his case of the embarrassment of not having a preponderance of evidence in his favor, which that court and the Supreme Court thought it lacked at the first trial.

We have gone over the evidence in connection with the oral and written arguments of the counsel, and have concluded that the plaintiff made a case which entitled him to the opinion of a jury as to his right to recover.

The particular claim made by him is that he discovered to defendants the parties who finally bought a tract of land several thousand acres, with coal underlying much of it. That defendants were authorized to sell what were known as the Halderman tract, the Hubbard & More tract and the Bailey tract. That he brought parties to Morgan county to examine the latter tract, with a view of buying it, and while there for that purpose, not succeeding in selling it to them, he called their attention to the Halderman tract and in that way caused them to purchase it of defendants. In a general way, the trial court instructed the jury in behalf of plaintiff that if they believed this to be the fact, plaintiff was entitled to one-half of commissions defendants may have made out of the sale. We think there can be no doubt that the jury, under these instructions, in connection with those for defendants, must have believed that plaintiff, within the rule stated in *Ramsey v. West*, 31 Mo. App. 676, and *Crowley v. Somerville*, 70 Mo. App. 376, was the procuring cause of the sale by producing the parties who afterwards purchased.

We do not consider that defendants have any substantial ground of complaint as to the instructions. As a series they certainly left no room for misunderstanding on the part of the jury. Those for the defendants covered every point of legitimate defense and the objec-

tions made as to those refused are in greater part technical. Of the latter, No. 6 is the subject of principal complaint. It stated that if plaintiff was introduced to C. W. Waldeck as the partner of defendants when he was not, and that plaintiff permitted such deception by his actions and otherwise, and if by such deception he obtained the name of Magenheimer as a possible or probable purchaser of the land and telegraphed to him, then such telegrams and the answer thereto should be disregarded in making a verdict, "unless you further believe that said Gould procured and induced or caused to be procured the purchaser for said lands fairly." We find it difficult to understand the instruction. It is subject to the criticism made by plaintiff's counsel. Notwithstanding what it terms a fraudulent assumption of partnership between plaintiff and defendants whereby he obtained the name of a prospective purchaser who bought the land, yet it is a concession that the purchaser may have been procured "fairly". At any rate, the effect of the instruction, as offered, was to select a special circumstance claimed by defendants, and thus give it prominence with the jury. We think that defendants' case had been clearly enough set forth in other instructions and that they were not entitled to this one, making special selections of a certain feature of it. We find no cause of complaint as to the admission of evidence.

The sum of the whole matter is that the case was one depending upon the solution of a great amount of contradictory testimony, much of which was subject to inferences of a nature favorable or unfavorable to either party, depending upon the point of view from which they were considered. It is a case, therefore, particularly for the determination of a jury. There has been no error that can be considered of substance, and with the result we have no right to interfere. The judgment will be affirmed. All concur.

JOHN A. BRIGHTWELL, Respondent, v. KANSAS CITY, Appellant.

Kansas City Court of Appeals, January 30, 1911.

1. **MUNICIPAL CORPORATIONS: Parks and Boulevards: Tax-bills: Certificate of Purchase.** In an action against the city for damages for the failure of its treasurer to perform the purely ministerial act of issuing a certificate to the purchaser at a sale of property under an assessment levied for the maintenance of parks and boulevards. *Held*, that the city in levying the assessment was acting in a governmental and not in a ministerial capacity, and that plaintiff's cause of action was against the recalcitrant officer, and not against the municipality.
2. ———: ———. State and municipal legislation relating to the establishment and maintenance in large cities of public parks, boulevards, and playgrounds is founded on the conviction that such institutions are a public necessity (just as streets, sewers, police, and fire protection are necessary to the general public welfare) and not mere utilities of special local value.
3. ———: ———: **Sovereign Distinguished from Private Functions.** In planning parks and boulevards, in condemning the necessary land, and levying special taxes to pay for such land, the functions are those pertaining to sovereignty, but in the subsequent work required to convert raw land into parks and boulevards, the city acts in its private corporate capacity.
4. ———: **Legislative Distinguished from Ministerial Act.** In the characterization of a given municipal act, it is not enough to constitute such act legislative that it be found to relate in a general way to a function of government. If substantially it is of a local or corporate nature, it will be classed as ministerial.

Appeal from Jackson Circuit Court.—*Hon. James H. Slover*, Judge.

REVERSED.

John G. Park, A. F. Smith and I. D. Hook for appellant.

(1) The action should have been brought against the city treasurer. a. For damages; b. By man-

damus. State ex rel. v. Green, 124 Mo. App. 80; 2 Abbott Municipal Corporations, 1613, 1614. State ex rel. v. Ashbrook, 154 Mo., 375; 3 Abbott, Municipal Corporations, 2472; Butler v. Moberly, 131 Mo. App. 172. (2) Kansas City is not liable. 2 Abbott, Municipal Corporations, 1098; Kansas City v. Ward, 134 Mo. 172; Willis v. Lambert, 168 U. S. 611; Shoemaker v. United States, 147 U. S. 282; Grading Co. v. Holden, 107 Mo. 305; Corrigan v. Kansas City, 211 Mo., 608; Young v. Railroad, 126 Mo. App. 69; 20 Am. and Eng. Ency. Law, 1195; 3 Abbott, Municipal Corporations, 2258. (3) The action is barred by the Statute of Limitations. Meyer v. Christopher, 176 Mo. 580; Ash & Gentry v. City of Independence, 103 Mo. App. 299. (4) The action should have been brought against the city treasurer for damages. Plaintiff's action is for damages for failure of the city treasurer to issue him certain certificates of purchase and it is not for money had and received by Kansas City.

B. D. Davis and L. A. Laughlin for respondent.

(1) No declarations of law were asked or given by the trial court. This court has decided that when an action at law has been tried by the court, without a jury, and no declarations of law are asked or given, the finding will not be reviewed by this court when there is any substantial evidence to support it. Corrigan v. Kansas City, 93 Mo. App. 173; Rice, Stix & Co. v. McClure, 74 Mo. App. 383; Life Ins. Co. v. Stone, 42 Mo. App. 383; Wood v. Land, 22 Mo. App. 425. (2) The first point made by defendant in its brief is that this action should have been brought against the city treasurer for damages. We take the position that when the property was knocked off to plaintiff, and he paid the purchase price, it then became the duty of the city to issue to plaintiff certificates of purchase. This was a mere ministerial duty, not requiring the exercise of the city's legislative

power, and entirely separate from its duties as a governmental agency.

JOHNSON, J.—This is an action to recover damages from the defendant city on the ground that it failed and refused to issue to plaintiff a certificate of purchase for land bought by him at a sale under a delinquent taxbill. In 1899 defendant levied a special assessment “upon all real estate, exclusive of improvements thereon, in the Westport Park District in Kansas City, Missouri, for the purpose of maintaining, adorning, constructing, repairing, and otherwise improving parks, parkways, boulevards and avenues located in Westport Park District,” etc. A number of property owners in the district refused to pay the assessments and in November, 1899, the city sold the property of the delinquents and at this sale plaintiff purchased a lot for which he paid the city \$32.29, and became entitled to a certificate of purchase.

No certificate was issued and in December following, certain property owners in the district brought suit in the circuit court of Jackson county against the city, the city treasurer and the purchaser at the sale to cancel and set aside the assessment and the sales thereunder on the ground that the proceedings were in violation of the Consitution of the state, and obtained a temporary injunction restraining the city and its treasurer from issuing certificates to the respective purchasers. Plaintiff was one of the purchasers against whom the injunction was issued. The suit was not finally tried in the circuit court until 1905, when a trial resulted in a judgment for the defendants and the injunction dissolved. The property owners appealed to the Supreme Court and in 1908, that court affirmed the judgment holding the proceedings constitutional and the assessment valid. [Corrigan v. Kansas City, 211 Mo. 608.]

Plaintiff made repeated demands of the different city treasurers for a certificate of purchase but these were refused and in 1909, he instituted the present suit for damages against the city alone. A jury was waived and after hearing the evidence the court rendered judgment for plaintiff for \$131. Defendant appealed.

As we view the case the decisive question at issue is whether the city should be held to respond in damages for the failure of its treasurer to perform the purely ministerial act of issuing a certificate to a purchaser at a sale of property under an assessment levied for the maintenance of parks and boulevards. And the answer to this question, in our opinion, depends on the answer to be given another question, viz.: In levying the assessment was the city acting in a governmental or a ministerial capacity? If it was acting in the former capacity it cannot be held liable for the torts of its officer in refusing to perform a ministerial act the law charges him with the duty of performing, but if the city acted in the latter capacity, it must be held responsible for such torts.

Pertinent statutory provisions are as follows:

"Sec. 6067. (Rev. Stat. 1899). *Parks, how established.*—Whenever any city desires to establish a park or pleasure grounds, the common council or mayor and board of aldermen of such city is hereby authorized and empowered to purchase or condemn lands in such city or within one mile thereof for that purpose, and shall by ordinance describe the metes and bounds of such lands to be purchased or condemned."

"Sec. 6075. *Power to establish roads, etc.*—Such board of park commissioners shall have power and authority to establish, open, pave and otherwise improve, in such manner and with such material as they may deem proper, within such park district, all such roads, boulevards and avenues as they may determine to be necessary or proper and useful to the inhabitants of such park district; and, for these purposes, shall have

jurisdiction over and may take possession of such of the streets in such city as they may deem necessary to afford to the inhabitants of such city convenient means of access to such parks."

The charter of the city provided (Charter and Ordinances of Kansas City, 1898, sec. 5, art. X): "Said board of park commissioners shall have power, and it shall be its duty, to devise and adopt a system of public parks, parkways, and boulevards, for the use of the city and its inhabitants, and to select and designate lands to be used and appropriated for such purposes, within or without the city limits, and to select routes and streets for boulevards,"

Further the charter and ordinances provided that special assessments for parks and boulevards should be subject to the same rebates on payment, the same penalties for non-payment and should be collected and enforced in the same manner as general taxes levied by the city.

It is manifest that the state and municipal legislation relating to the establishment and maintenance in large cities of public parks, boulevards and playgrounds is founded on the conviction that such institutions are a public necessity just as streets, sewers, police and fire protection are necessary to the general public welfare. This view of the importance of such institutions and of their indispensableness in large centers of population is supported by the weight of authority in this state and other jurisdictions and invests them with the charter and attributes of general public necessities to municipalities of classes to which large cities belong as distinguished from mere utilities of special local value.

In 2 Abbott on Municipal Corporations, 1898, the author says: "The expenditure of public moneys for objects having for purpose the protection and betterment of the good morals and health of the people has

always been regarded not only legitimate but praiseworthy. The opportunity for diversion and amusement in the open air is an object of such character and may be effected through the establishment and maintenance of public parks and boulevards."

In *Shoemaker v. United States*, 147 U. S. 282, the court, speaking through Mr. Justice SHIRAS say: "In the memory of men now living, a proposition to take private property without the consent of the owner for a public park and to assess a proportionate part of the cost upon real estate benefited thereby, would have been regarded as a novel exercise of legislative power . . . there is now scarcely a city of any considerable size in the entire country that does not have such parks. The validity of the legislative acts erecting such parks, and providing for their costs has been uniformly upheld . . . land taken in a city for public parks and squares, by authority of law, whether advantageous to the public for recreation, health or business is taken for a public use."

In *Wilson v. Lambert*, 168 U. S. 611, the same court speaks approvingly of a New York decision holding "that the taking the grounds of individuals in a city to convert into a public square, is taking the property for public use as much so as if such grounds were converted into a street; and the fact of the damages being assessed upon the owners of adjoining property instead of being levied as a general tax upon the city, is no evidence that the property is not taken for public use," and gives voice to the view that "the effort made to distinguish between streets and highways as constituting proper subjects of taxation for special benefits, and public parks, as matters of such a general nature as not to justify special assessments, does not appear to us to be successful."

Our own Supreme Court has this to say on the subject in *Kansas City v. Ward*, 134 Mo. l. c. 177: "Public parks in densely populated cities are manifest-

ly essential to the health, comfort, and prosperity of their citizens. It is universally conceded, and not disputed in this case, that such improvements are public use, within the meaning of the Constitution, for the purposes of which, the land of the citizen may be taken upon payment of a just compensation. County Court v. Griswold, 58 Mo. 175; Shoemaker v. United States, 147 U. S. 297, and cases cited."

Having ascertained that acquisition by the city of property for park and boulevard purposes was for the public good and the public use, we pass to the question of whether the city in the performance of such service to the public was acting as an agency of the government or in its private or corporate character for securing a mere special local advantage. As to acts of the latter character the rule thus is stated in 2 Dillon on Munic. Corp. (4 Ed.), sec. 980:

"The doctrine may be considered as established, where a given duty is a corporate one, that is, one which rests upon the municipality in respect of its special or local interests, and not as a public agency, and *is absolute and perfect*, and not discretionary or judicial in its nature, and *is one owing to the plaintiff*, or in the performance of which he is specially interested, that *the corporation is liable in a civil action* for the damages resulting to individuals by its neglect to perform the duty, or for the want of proper care or want of reasonable skill of its officers or servants acting under its direction or authority in the execution of such a duty; and, with the qualifications stated, it is liable, on the same principles and to the same extent, as an individual or private corporation would be under like circumstances. For illustration, if a city neglects its *ministerial duty* to cause its sewers to be kept free from obstructions, to the injury of a person who has an interest in the performance of that duty, it is liable, as we shall see, to an action for the damages thereby occasioned."

In the characterization of a given municipal act it is not enough to constitute such act legislative that it be found to relate in a general way to a function of government. If substantially it is of a local or corporate nature it will be classed as ministerial. We recognized and applied this test in *Young v. Railroad*, 126 Mo. App. 1, where we held the city liable for the negligence of servants cleaning streets. But even this test applied to the case in hand does not divest the municipal acts of condemning property for public use and providing for its payment of their real character as acts of a purely governmental nature.

There is a strong and, we think, perfect analogy between such acts and those relating to laying out a street or sewer and condemning property therefor. No one would have the hardihood to contend that such functions were not legislative and judicial in their nature and we perceive no difference between them and the functions in question. In the construction of a street or sewer the city acts ministerially and is liable for the torts of its servants, but in planning and procuring the land for such improvements, it acts as an agency of government and is not liable for the torts of its servants. So with its parks and boulevards. In planning them, in condemning the necessary land, and in levying special taxes to pay for such land, the functions are those pertaining to sovereignty, but in the subsequent work required to convert raw land into parks and boulevards, the city acts in its private corporate capacity.

Plaintiff has no cause of action against the city. He was not without remedy but his action, whether at law or in equity, should have been against the recalcitrant officer and not against the municipality.

The judgment is reversed. All concur.

INDEPENDENCE SASH, DOOR AND LUMBER
COMPANY, Respondent, v. J. J. BRADFIELD et
al., Appellants.

Kansas City Court of Appeals, January 30, 1911.

1. **MECHANICS' LIENS: Variance: Admissions at Trial.** Where the petition alleges a joint contract between the contractor and the two owners, who were tenants by the entirety, while the proof shows that the contract was made by only one of the owners, the husband, there was no variance when the contract as pleaded was admitted at the trial by counsel for defendants.
2. **APPELLATE PRACTICE: Admission at Trial.** It is a settled rule of practice that an admission of fact, on which the cause is tried in the circuit court, is binding on the parties in the appellate court.
3. **MECHANIC'S LIEN: Verification of Affidavit.** The addition to the signature of the official title of the affiant who appended the word "secretary" to his signature to the affidavit of lien should be regarded as merely descriptive, and therefore such an affidavit was sufficiently signed.
4. ———: **Notice: Service on One Tenant by the Entirety.** Where the notice of the sub-contractor of its intention to file a lien was served only on the husband, and not on the wife, they being tenants by the entirety, under the provisions of the statutes requiring service of notice on "the owner, owners, or agent," which are highly remedial, and should be given a liberal construction. *Held*, that the statute contemplates that a lien shall not be lost through an honest mistake in ascertaining the names of all the owners. Hence, the notice was effective as to the estate of the husband.
5. ———: **Tenants by the Entirety: Separate Judgment.** Where the relations, to each other and to strangers, of defendants in a mechanic's lien, said defendants being tenants by the entirety, were subject to the provisions of the Married Woman's Act of 1889, each is "an owner" within the purview of the mechanics' liens statutes, and by contract may subject his or her estate to liens for improvements erected on the land. Hence, a judgment against the estate of the husband alone will be affirmed.

Appeal from Jackson Circuit Court.—*Hon. Walter A.
Powell, Judge.*

AFFIRMED.

David I. White and I. J. Ringolsky for appellant.

(1) There was a variance between the material allegations in the plaintiff's petition, and the proof. *H. D. Hengstenberg v. W. F. Hoyt*, 109 Mo. App. 622; *Lumber Co. v. Knights of Pythias*, 157 Mo. 366; *Timber Co. v. Railroad*, 180 Mo. 463; *Meyers v. Railroad*, 120 Mo. App. 228; *Chitty v. Railroad*, 148 Mo. 64. (2) There was no verification as required by law, of the lien filed with the clerk of the circuit court of Jackson county, Missouri, and the court erred in admitting the lien paper offered in evidence by the plaintiff over the objection of the defendants. *R. S. 1909, sec. 8217*; *Norman v. Horn*, 36 Mo. App. 419. (3) The notice of the subcontractor of its intention to file a lien on the property, should have been served on all of the owners. *R. S. 1909, sec. 8231*; *Towner v. Remick*, 19 Mo. App. 205. (4) As the property in question was owned jointly by Mary A. Heinselman and Hugh W. Heinselman in an estate by the entirety, the court erred in rendering judgment in favor of Mary A. Heinselman and against Hugh W. Heinselman, the judgment, if at all, should have been rendered against them both or against neither. *R. S. 1909, sec. 2878*; *Hall v. Stevens*, 65 Mo. 670; *Bain v. Bullock*, 129 Mo. 117; *Cox v. Railroad*, 123 Mo. App. 356.

W. B. Kelly and Horace Sheley for respondent.

(1) There was no variance between the material allegations of the petition and the proof, as the allegation regarding Mary A. Heinselman was not material. *Brown v. Wright*, 25 Mo. App. 54; *Hassett v. Rust*, 64 Mo. 325; *Lumber Co. v. Stoddard Co.*, 113 Mo. App. 306. (2) And if there was a variation there was no total failure of evidence, and appellant filed no affidavit of surprise,

so the point is not open to review on appeal. *R. S. Mo.* 1909, sec. 1846; *Fisher Co. v. Realty Co.*, 159 *Mo.* 562; *Donovan v. Brewing Co.*, 92 *Mo. App.* 341. (3) The verification is sufficient. *Laswell v. Church*, 46 *Mo.* 279. (4) The service of notice on Hugh W. Heinselman was sufficient to subject his interest in the property to a lien. *Chambers v. Benoist*, 25 *Mo. App.* 520; *Library Co. v. Stoddard Co.*, 113 *Mo. App.* 306. (5) An estate by the entirety is subject to a mechanic's lien. 20 *Am. and Eng. Ency. Law* (2 Ed.), p. 317; *Van Ripper v. Morton*, 61 *Mo. App.* 440; *Hall v. Stephens*, 65 *Mo. App.* 670; *Hume v. Hopkins*, 140 *Mo.* 65; *Hoffman v. Nolte*, 127 *Mo.* 120; *Howe v. Jasper County, etc., Co.*, 127 *Mo. App.* 570; *Kegan v. Haslett*, 128 *Mo. App.* 286; 20 *Am. and Eng. Ency. Law* (2 Ed.), 327n; *Washburn v. Burns*, 34 *N. J. L.* 18; *Bertles v. Numan*, 92 *N. Y.* 156.

JOHNSON, J.—Action to enforce a mechanic's lien. Plaintiff, a materialman, furnished material for a building erected by Hugh W. Heinselman and Mary A. Heinselman, husband and wife, on land they purchased in 1907, and held as tenants by the entirety. Plaintiff furnished the material under contract with the contractor (defendant Bradbury) who, it is admitted, erected the building under a contract with both tenants. The petition alleges "that said property was at the date of furnishing said material and now is, the property of the defendants, Hugh W. Heinselman and Mary A. Heinselman and the said J. J. Bradfield was the original contractor with the said Hugh W. and Mary A. Heinselman for the erection of said building."

The lien paper alleged that Hugh Heinselman was the owner and did not mention the fact that his wife had an interest in the property or was a party to the contract for the improvement. It was verified by E. C. Harrington who appended the word "secretary" to his

signature. Notice of the lien was addressed to and served on the husband alone. On these facts the court rendered judgment in favor of defendant Mary Heinselman and adjudged that "all the right title and interest of the said defendant Hugh W. Heinselman" be charged with the lien, etc. The cause is before us on the appeal of the defendant Hugh.

Four propositions are argued by counsel of the appealing defendant, viz.: First. "There was a variance between the material allegations in the plaintiff's petition and the proof." Second. "There was no verification as required by law of the lien filed with the clerk of the circuit court of Jackson county, Missouri, and the court erred in admitting the lien paper offered in evidence by the plaintiff over the objection of the defendants." Third. "The notice of the sub-contractor of its intention to file a lien on the property should have been served on all of the owners." Fourth. "As the property in question was owned jointly by Mary A. Heinselman and Hugh W. Heinselman in the estate by the entirety the court erred in rendering judgment in favor of Mary A. Heinselman and against Hugh W. Heinselman. The judgment, if at all, should have been rendered against them both or against neither."

We shall determine these questions in the order stated.

I. This point rests on the contention that the petition alleges a joint contract between the contractor and the two owners, while the proof shows that the contract was made by only one of the owners—the defendant Hugh. It sufficiently answers the point to say that the contract as pleaded was admitted at the trial by counsel for defendants, as appears in the following quotation from the proceedings:

"Q. Who did you make this contract with?" Counsel for defendants: "I object to that. The petition charges that the contract was made with Hugh W.

Heinselman and Mary A. Heinselman and the answer admits it."

We shall not go behind that admission despite the fact subsequently developed that the contract was signed by the husband alone. That fact is not inconsistent with the admission and it is a settled rule of practice that an admission of fact, on which the cause is tried in the circuit court is binding on the parties in the appellate court.

II. The affidavit was sufficiently signed. [Laswell v. Church, 46 Mo. 279.] The addition to the signature of the official title of the affiant should be regarded as merely descriptive. The case of Norman v. Horn, 36 Mo. App. 419, is not in point. There the signature and oath appeared to have been made a partnership and it was properly held that a partnership, as such, could not make an affidavit. "It would be just as reasonable," say the court, "to hold that a corporation, as such, could make an affidavit, as to hold that a firm could." In the present case the instrument does not bear the attempted verification of a partnership or corporation but of an individual who might be held liable for perjury for a false affidavit knowingly made.

III. The mechanics' lien statutes are highly remedial and should be given a liberal construction. Though they require a sub-contractor or materialman to serve notice on "the owner, owners or agent" of the property, they contemplate that an honest mistake may be made in ascertaining the names of all the owners and intend that the lien shall not be lost in consequence of such mistake in the lien paper or notice. [Sash & Door Works v. Shade, 137 Mo. App. 1. c. 23.] In Lumber Co. v. Stoddard, 113 Mo. App. 306, the St. Louis Court of Appeals properly held that service of notice on one of two co-owners of the property was sufficient to hold his interest or estate subject to the lien. For reasons which

our discussion of defendant's final proposition will make apparent, we think this rule should obtain in the present case and hold, as did the learned trial judge, that the notice was effective as to the interest or estate of the appealing defendant.

IV. The ownership of the land being acquired by the appealing defendant and his wife in 1907, their relations to each other and to strangers, as tenants by the entirety were subject to the provisions of the Married Woman's Act of 1889. [Holmes v. Kansas City, 209 Mo. 513; Bains v. Bullock, 129 Mo. 117; Arnold v. Willis, 128 Mo. 145.] Prior to that legislation the common law rules pertaining to the peculiar estate under consideration prevailed in this state and during the joint lives of the tenants they were considered as a unit in the ownership of the estate—and the husband was the unit. [Hough v. Light & Fuel Co., 127 Mo. App. 570, and cases cited.] The statute changed this rule and now the wife during coverture is recognized as having an interest, not only in the inheritance, but in the possession which she may enforce and protect in actions prosecuted by her alone. [Holmes v. Kansas City, *supra*.]

In Bains v. Bullock, *supra*, the Supreme Court say: "The marital control of the husband over the real estate of his wife is removed and she is given the power to sue 'at law or in equity with or without her husband being joined with her as a party.' The right to sue in her own name seems to be unlimited. That she has the right to sue in ejectment to recover possession of her land has been decided. [Arnold v. Willis, *supra*.]"

As the law now stands each of the tenants, during their joint lives, has an interest in the inheritance and, as to strangers, each has a present right of possession which may be enforced either at law or in equity. Each is an "owner" within the purview of the mechanic's lien statutes and by contract, may subject his or her estate

Tate v. Railroad.

to liens for improvements erected on the land. Such is our ruling in *Nold v. Ozenberger*, decided at this term, and we reaffirm here what was said by *BROADDUS, P. J.* in that case.

The judgment is affirmed. All concur.

BEN TATE, Respondent, v. WABASH RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, January 30, 1911.

1. **RAILROADS: Negligence; Crossing: Milch Cows.** Where an owner of two milch cows turns them out of a neighbor's pasture into the public road, to take them to his home, a short distance away, and across a railway track, and they are killed by a train which gave no signal of approach, the railway is liable where the owner, on seeing the train, endeavored to turn the cows back.
2. ———: ———: **Sounding Whistle: Ringing Bell: Instruction.** An instruction which directs the jury to find for the plaintiff the value of his milch cows killed at a public crossing, if they believe the railway company's servants neglected to sound either the whistle or the bell, is erroneous.
3. ———: ———: ———: ———: **Evidence.** But if, in such case, the railway company does not introduce any evidence, and the plaintiff shows by undisputed affirmative testimony that neither the bell nor the whistle was sounded, the error is harmless.

Appeal from Boone Circuit Court.—*Hon. N. D. Thurmond, Judge.*

AFFIRMED.

E. W. Hinton for appellant.

(1) The failure to sound the whistle at the whistling post was wholly immaterial in this case, because

the boy in charge of the cows actually saw the train as soon as he could have been warned by the statutory signal, and hence the court should have directed a verdict for defendant. *Hutchinson v. Railroad*, 195 Mo. 546; *Hutchinson v. Railroad*, 161 Mo. 246; *McManamee v. Railroad*, 135 Mo. 440; *McGee v. Railroad*, 214 Mo. 533. (2) The plaintiff's son was guilty of contributory negligence as a matter of law in allowing the cattle to get so close to the track that he could not head them, before taking any precautions to observe the train. *Nolan v. Railroad*, 50 Atl. Rep. 348; *Railroad v. Entsminger*, 92 Pac. Rep. 1095; *Railroad v. Wheeler*, 101 Pac. 1001; *Sanguinette v. Railroad*, 196 Mo. 466. (3) The circumstances were clearly sufficient to warrant a finding of contributory negligence as a matter of fact, and hence the plaintiff's instructions were erroneous in ignoring that defense which was properly pleaded, and in authorizing a verdict for plaintiff without reference to contributory negligence. *Abbott v. Mining Co.*, 112 Mo. App. 550; *Hanheide v. Transit Co.*, 104 Mo. App. 323; *Laughlin v. Gerardi*, 67 Mo. App. 372. (4) The plaintiff's instruction on the first count was erroneous in directing a verdict for plaintiff if either of the statutory signals was not given. *Turner v. Railroad*, 78 Mo. 578; *Van Note v. Railroad*, 70 Mo. 641; *Terry v. Railroad*, 89 Mo. 586.

Webster Gordon and N. T. Gentry for respondent.

(1) A failure to sound the whistle at the whistling post and the failure to sound the same at intervals until the crossing was passed, and the failure to ring the bell at all, were the acts of negligence charged in the first count of the petition, and the jury found that the same resulted in the killing of plaintiff's cows. The fact that plaintiff's son, in charge of said cows, saw the defendant's train, at or near the whistling post, is not sufficient to excuse the defendant for its failure to give

the statutory signals. (2) The plaintiff's son was not guilty of contributory negligence as a matter of law. Our Missouri courts have never held that a farmer is guilty of contributory negligence in driving cattle along public highways, even when the highway crosses the railroad track. (3) No error was committed by the trial court in failing to give an instruction on the subject of contributory negligence. The trial court does not have to give instructions in a civil case for a party, unless asked to do so. If defendant had desired to have the jury instructed on that subject it was its plain duty to prepare an instruction and ask the court to give it. Having failed to offer any instruction on that subject at the trial, it has waived its right to have the law declare upon said subject. Mere non-direction is not misdirection, as our courts and text-writers have often said. *Morgan v. Mulhill*, 214 Mo. 462; *Booker v. Railroad*, 144 Mo. App. 292; 2 *Thompson on Trials*, sec. 2341 *Williamson v. Transit Co.*, 202 Mo. 373; *Marion v. Railroad*, 124 Mo. App. 445. (4) Plaintiff's first instruction told the jury that it was the duty of defendant's servants, agents and employees in charge of its locomotive and cars to sound the steam whistle of said locomotive at a point at least eighty rods before reaching the crossing of the public road and to sound said whistle at intervals until said locomotive had crossed said public road or to ring the bell of said locomotive at a point at least eighty rods before reaching the crossing of the public road and to continue to ring the same until said locomotive had crossed the public road. This instruction follows the language of the Kansas City Court of Appeals in referring to our statute. *Atterberry v. Railroad*, 110 Mo. App. 615; *Wasson v. McCook*, 70 Mo. App. 397; *Kirkpatrick v. Railroad*, 71 Mo. App. 268.

ELLISON, J.—Defendant's train struck and killed two of plaintiff's cows at a place where its road crosses

a public highway, and he brought this action for damages. The judgment in the trial court was in his favor.

The following are the facts, substantially as stated by defendant:

The plaintiff lived on a farm on the east side of and adjoining the railroad, about a mile from the village of Hallsville. At this place the railroad runs in a general northeast and southwest direction. There is a county road about a quarter of a mile to the west of, and nearly parallel with it.

Another public road, referred to in the evidence as a lane, runs from the first county road in a general easterly direction across the railroad to the plaintiff's farm.

According to the witnesses, the cross road runs east, then makes a "jog" south for about seventy-five steps, and east about forty-five or fifty steps to the crossing.

In going east toward the crossing, the view of the railroad to the north was somewhat obstructed by corn at the time of the accident, but from the jog south there was a clear view for at least a half miles northeast of the crossing.

On the afternoon of the accident the plaintiff's son, a boy of seventeen, was bringing the cows home toward the crossing, from a neighbor's pasture. After he turned south, and while he was in the "jog" he noticed a train up at the whistling post, coming south toward the crossing. He then got over the wire fence and attempted to get ahead of the cows, but did not succeed. The cows went onto the crossing immediately in front of the train and were instantly struck and killed. The train was late and running at a high rate of speed, variously estimated at from forty to fifty miles an hour. The engine was running backwards.

A number of witnesses for the plaintiff testified that the bell was not rung and that the whistle was first sounded after the train had passed the whistling post

and reached a willow tree some hundred and thirty yards from the crossing.

At this point the brakes were applied, and the speed somewhat slackened, but not enough to do any good. The defendant did not introduce any proof.

We are satisfied with the trial court's view of the demurrer to plaintiff's evidence. The case was properly submitted to the jury. The case, as made by the evidence, cannot fairly be likened to that of an individual crossing a track. Of course, there are instances where one's acts in driving cattle could be illustrated by the duty one owes when himself crossing; but this is not one of them.

We think the only question in the case was that of negligence on the part of the defendant in regard to signals, and in this regard we are not impressed with the argument in defendant's behalf. If the signals had been given as required by statute, it might have attracted the attention of the cows and have prevented them, in one way or another, from going upon the track; or it may have caused them to get over without being struck.

The only question presented looking towards a reversal of the judgment is in regard to an instruction which seems to have required the defendant to have sounded *both* the whistle and the bell. If either signal is given, it is all the statute requires. [Turner v. Ry. Co., 78 Mo. 578; Van Note v. Ry. Co., 70 Mo. 641; Terry v. Ry. Co., 89 Mo. 586.] The case cited by plaintiff, Atterberry v. Ry. Co., 110 Mo. App. 608, does not sustain the instruction. Sometimes a slight change in wording makes a great difference in meaning, and care should be taken when intending to inform a jury that only one of two duties is required, not to tell them that both must be performed. In this case plaintiff's first instruction clearly enough informed the jury that it was defendant's duty to sound the whistle, or to ring the bell. Then, in the second instruction, by changing the form

of the statement, the jury were directed to find for plaintiff if they believed from the evidence that defendant failed to do either of these duties. This was the language, omitting parts not applicable: "If the jury believe from the evidence that . . . the servants of defendant in charge of the locomotive and cars neglected to sound the steam whistle of said locomotive at a point . . . or that said servants neglected to ring the bell of said locomotive at a point . . . then the jury should find for the plaintiff . . ." Thus the jury were told that if they believed the defendant neglected either of those duties, it was liable.

But the question remains: Was there any harm done defendant in view of the undisputed evidence that *neither* of the duties was performed as required by the statute? We have already said that defendant did not introduce any evidence, while that for plaintiff established, by abundant affirmative testimony, that the whistle was not sounded and the bell was not rung.

In such condition of case, we think the technical error ought not to disturb the judgment, and it will accordingly be affirmed. All concur.

LUCY A. HATCHER, Respondent, v. THE NATIONAL ANNUITY ASSOCIATION, Appellant.

Kansas City Court of Appeals, January 30, 1911.

FRATERNAL BENEFICIARY ASSOCIATIONS: Benefit Certificates. A benefit certificate, as originally issued by the Loyal Knights, a fraternal benefit society, provided for the payment at death of ten times the total amount he should pay into the mortuary fund of the society, not to exceed two thousand dollars. Later a "rider" was issued, increasing the benefits to twenty three times the amount so paid. Thereafter, the holder transferred membership to another similar association. Death ensued, and this action was brought on said certificate.

Hatcher v. Annuity Association.

Held, that as the contract of assumption between the latter association and the deceased member provided for payment as set out in the original certificate, the full measure of plaintiff's recovery was ten times the monthly mortuary assessments paid by the member, and it was immaterial whether the "rider" was legally adopted or not.

Appeal from Livingston Circuit Court.—*Hon. Arch B. Davis*, Judge.

REVERSED AND REMANDED (*with directions*).

David C. Finley and *F. S. Hudson* for appellant.

(1) Appellant is indebted to respondent in accordance with the provisions set out on the face of the original certificates as issued to Hatcher by the Loyal Knights, viz.: ten times the amount he paid into the mortuary fund (See "Certificate of Assumption," page 14 of the record). (2) The mortuary fund consists of seventy-five per cent of the monthly assessments after the first year, together with such of the first year's assessments remaining unused for general fund purposes (see by-laws as to the mortuary fund. page 28 of the record). (3) Respondent failed to show that the original certificates as issued to Hatcher by the Loyal Knights, increasing its promised benefits from ten to twenty-three times the amount he should pay into the mortuary fund; was legally adopted. Angell & Ames on Corporations (11 Ed.), sec. 328; 1 Waterman on the Law of Corporations, p. 235; Bacon on Benefit Societies, sec. 80; Van Atten v. Modern Brotherhood, 131 Iowa 232. (4) The contract between appellant and Guy F. Hatcher is unambiguous and therefore parol or extrinsic evidence to explain, alter, modify or enlarge it should not have been admitted. McClurg v. Whitney, 82 Mo. App. 625; Halliday v. Lesh, 85 Mo. App. 285; Michael v. St. Louis Mut. Ins. Co., 17 Mo. App. 23; Rubey v. Coal Co., 21 Mo. App. 159; Miller v. Dunlap, 22 Mo. App. 97; Walker v. Automobile Co., 124 Mo. App. 628; Eaton v. Coal Co., 125 Mo. App. 194.

Scott J. Miller for respondent.

(1) A finding or judgment by the court on the facts will not be disturbed, if sustained by sufficient evidence, or substantially supported by the evidence. *Rosche v. Cook*, 81 Mo. App. 616; *Moore v. Farmer*, 156 Mo. 33; *Mfg. Co. v. Somerville*, 84 Mo. App. 226; *McClanahan v. Payne*, 86 Mo. App. 284; *North Fur. & C. Co. v. Davis*, Id. 296; *Clements v. Turner*, 162 Mo. 466; *Flanagan v. O'Connell*, 88 Mo. App. 1; *Curtis v. Tyler*, 90 Mo. App. 345; *Corrigan v. Kansas City*, 93 Mo. App. 173; *Fuhlage v. Nagle*, 105 Mo. App. 471. (2) Where a case is tried by the court sitting as a jury, the weight to be attached to the evidence is a matter to be determined exclusively by the court, and this court on appeal will not review it. *Allen v. Jones*, 50 Mo. 205; *Twiss v. Hopkins*, Id. 398; *Miller v. Breneke*, 83 Mo. 163. (3) A finding by the trial court on a question of fact which there is evidence to support will not be set aside on appeal. *Allen v. Bank*, 4 Mo. App. 66; *Montgomery v. Harker*, 81 Mo. 63; *Gaines v. Saunders*, 87 Mo. 557; *Cook v. Farrah*, 105 Mo. 492; *Pierson v. Slifer*, 52 Mo. App. 273; *Hellman v. Bick*, 55 Mo. App. 168; *Grant v. Moon*, 128 Mo. 43; *Lester ex rel. v. Givens*, 74 Mo. App. 395. (4) The court goes further and says a finding by the trial court will not be disturbed by the court on appeal where there is any evidence to support it, or the evidence tends to support it. *Huckshorn v. Hartwig*, 81 Mo. 648; *Rothschild v. Wabash, et al.*, 92 Mo. 91; *Mead v. Spaulding*, 94 Mo. 93; *Culverhouse v. Worts*, 32 Mo. App. 419; *Krider v. Milner*, 99 Mo. 145; *Handian v. McManus*, 100 Mo. 124. (5) In a trial by the court without a jury, the court's conclusions of fact will not be interfered with on appeal, unless there is no evidence whatever to support them. *Ball v. Railroad*, 83 Mo. 574. (6) The finding of a trial judge sitting as a jury, having substantial support in the evidence cannot be reversed on appeal, whether or

not it agrees with the appellate court's view of the probative force of the entire evidence. *Fairbank Co. v. Cotton Oil Co.*, 81 Mo. App. 523. (7) Carl Blanchard was the agent of the defendant, in collecting the dues, and the court so found; and this finding will not be disturbed on appeal. *Bannister v. Engine Co.*, 82 Mo. App. 528. (8) The question, under the evidence, of whether or not Berry knew, personally, of the amendment rider, which we claim was not necessary, was submitted to the court and tried out, and the court found that he did. This will not be disturbed on appeal. *Stoutimore v. Clark*, 70 Mo. 471; *Robertson v. Hope*, 121 Mo. 34.

BROADDUS, P. J.—This is a suit to recover on a fraternal benefit certificate.

In 1905, there was organized under the laws of Missouri a fraternal benefit society, called the Loyal Knights, with headquarters at Chillicothe. But as the organization did not prosper, in 1907 a certain number of its members transferred their allegiance and membership to the National Annuity Association, among which was Guy F. Hatcher, the holder of the certificate in suit. The certificate as originally issued by the Loyal Knights provided for a payment at death of ten times the monthly mortuary assessments he shall have paid into the order previous to his death, not exceeding the sum of \$2000. On August, 1, 1905, the Loyal Knights issued what are called "riders" to its members increasing the possible benefits, and such a rider was issued to Hatcher increasing the benefits on his certificate from ten to twenty-three times the total sum he should pay into the mortuary fund of the society. When Hatcher and others transferred their membership and allegiance to the appellant association, it issued the following document demoniated: .

"CERTIFICATE OF ASSUMPTION.

"This is to certify that in consideration of the assumption by the National Annuity Association of Kan-

sas City, Missouri, of the benefit certificate issued by the Loyal Knights, of Chillicothe, Missouri, above described, the undersigned member transfers his membership to the National Annuity Association, assumes its obligations and agrees for himself and beneficiaries, to abide by the laws of said association now in force, or that may hereafter be adopted.

"It is agreed and understood, however, that the amount to be paid at death, by the National Annuity Association, will be the same as that set out on the face of the original benefit certificate issued by the Loyal Knights, to which a copy of this agreement is attached, less only amounts previously paid for disability or other benefits."

There was much evidence introduced as to whether the by-law of the Loyal Knights providing for the "rider" increased the benefits on certificates from ten to twenty-three times the total sum paid by the member into the mortuary fund of the society was legally adopted.

The case was tried before the court without the aid of a jury.

As we consider the case it was immaterial whether said by-law was legally adopted or not. The contract between the deceased member and the appellant governs the defendant's liability. It is a plain, simple contract which contains the unambiguous stipulation that; "the amount to be paid at death, by the National Annuity Association will be the same as set out on the face of the original benefit certificate issued by the Loyal Knights." The original benefit certificate on its face provides for a payment at death of ten times the monthly mortuary assessments paid by the member. Under the written contract of assumption, ten times the monthly mortuary assessments paid by the member constitutes the full measure of plaintiff's recovery.

We have examined respondent's motion to dismiss the appeal, but do not think the causes assigned are sufficient to justify the court in sustaining and it is

therefore overruled. The case is therefore reversed and remanded with directions to the court to render judgment in accordance with this opinion. All concur.

EDLING-ADCOCK REAL ESTATE COMPANY, Appellant, v. C. A. THOMPSON and FLORA E. THOMPSON, Respondents.

Kansas City Court of Appeals, February 13, 1911.

REAL ESTATE AGENTS: Commission: Instruction. In an action on a note given a real estate agent for commission for the exchange of property, where the defense is want of consideration because a commission was paid by the other party to the transaction, and no notice given them by the agent that he was acting for both parties, it was error for the court to refuse an instruction that the burden of proof was on the defendants to show by a preponderance of the evidence that the defendants and the other party to the exchange of property were not aware that plaintiff was acting as agent for both of them.

Appeal from Jackson Circuit Court.—Hon. John G. Park, Judge.

REVERSED AND REMANDED.

C. A. Edling for appellant.

This is a simple action on a promissory note between the original payee and payors and is governed by the law merchant; the contract, the note sued on, was plain and unambiguous in its terms. It is a complete contract in all its terms. Plaintiff is not bound to make affirmative proof of a breach of any legal duty. Under the statute the production of the note in evidence when its execution is not denied, makes a prima facie case. A promissory note is given for value received; this is signed by the makers and is an admission on their part

that value has been received for it, which is good consideration. It is produced by the holder and is proof that after being signed it was delivered to the promisee and is, therefore evidence of a contract on good consideration between the promisor and promisee under the promisor's hand. If then on the trial when a note is sued on by the promisee against the promisor, the plaintiff produces the note and the signature is admitted or proved, it has made out a prima facie case and has no occasion to go further until the contrary is shown. The burden of proof is upon the defendants to establish by a preponderance of the evidence the failure or lack of consideration. *Holmes v. Harris*, 97 Mo. App. 365.

W. W. Calvin for respondents.

(1) Where an agent or broker attempts to represent both parties to a transaction; and charges, exacts or agrees to receive a commission or brokerage from each of them on account thereof, he will be denied a recovery in an action against either, for such commission or brokerage, unless it be shown that both parties to the transaction had full knowledge or were aware of the dual relation of such agent or broker, and consented thereto. *Chapman v. Currie*, 51 Mo. App. 44; *Atlee v. Fink*, 175 Mo. 104; *Rosenthal v. Drake*, 82 Mo. App. 358; *McLuer v. Ulman*, 102 Mo. App. 703; *Meacham on Agency*, sec. 972; *Atterbury v. Hopkins*, 122 Mo. App. 172; *Owens v. Matthews*, 123 Mo. App. 463; *Winter v. Carey*, 127 Mo. App. 601; *Corder v. O'Neil*, 207 Mo. 632; *Dennison v. Gault*, 132 Mo. App. 301. (2) Where, in an action by such agent or broker against either party to such a transaction, it is admitted by him that he had received or agreed to receive a commission or brokerage from each of the parties to such transaction, the burden of proof was then cast upon him to show that both of said parties knew of his double agency and that the transaction was consummated with such knowledge

on their part. *Dennison v. Gault*, *supra*, and other cases *supra*.

BROADDUS, P. J.—This is a suit to recover on a promissory note executed by defendants and payable to plaintiff, dated June 25, 1908, due in thirty days after date.

The defendants resisted payment on the ground that it was without consideration.

The facts disclosed by the evidence are that plaintiff while engaged as a real estate broker acted as agent for the defendant, C. A. Thompson, in procuring an exchange of his property for that of a man of the name of Doty, and it is also admitted by plaintiff at the same time that he was the agent also of said Doty. After the exchange had been made, J. T. Edling, plaintiff's agent, according to the testimony of the defendant, said: "Now, Mr. Thompson, let us settle this commission business;" that he said in reply that he did not understand he was to give any commission, as he supposed that plaintiff was handling the deal on the part of Mr. Doty. Edling said: "I expect a commission out of each;" and that he finally said: "If you don't pay me a commission, I won't get anything." Not having the money he gave the note in question.

Doty testified that he paid Edling, the plaintiff's agent, as commission on his services in the matter, \$250; and that he did not know during the time in which the negotiations were pending that plaintiff was acting for the defendant.

After the note was introduced in evidence Edling was introduced and after testifying that the signatures to the note were those of defendants and that it had not been paid, he was cross-examined by the defendant. He admitted that he was as agent of plaintiff acting for both parties in the deal; and that he notified each that he was acting as agent for the other.

The plaintiff asked the court to instruct the jury the practical effect of which was, that, the burden of proof was on defendants to show to the satisfaction of the jury by a preponderance of the evidence, that defendant Thompson and Doty were not aware of the fact that plaintiff was acting as agent for both of them in the transaction. Other instructions were given, but we do not think they were objectionable.

The jury returned a verdict for the defendants. Plaintiff appealed from the judgment.

The court committed error in the refusal of said instruction. Respondent insists as a different result could not have been reasonably expected, the cause should be affirmed. It is not for us to say what the verdict of the jury would have been had they been properly instructed. The error was not merely technical, but of a most substantial character.

Reversed and remanded. All concur.

A. **McKINSTREY, Respondent, v. CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY, Appellant.**

Kansas City Court of Appeals, February 13, 1911.

1. **COMMON CARRIERS: Shipping Horses: Notice of Damage.** The provision in a contract of shipment that notice of loss or injury be given one day after delivery at destination, is valid, but it must be reasonably and justly construed in its application to the facts in each case.
2. **——: Contract of Shipping.** The contract of a common carrier with a shipper limiting the carrier's common law liability is valid if made in consideration of a reduced rate, but where there is no reduced rate or other valuable consideration, the carrier is liable just as if the contract contained no such stipulation.
3. **——: Contracts of Shipping.** A contract of affreightment is governed by the law of the place where it is made, unless it appears that it was otherwise intended by the parties.

McKinstrey v. Railroad.

4. ———: Evidence. The common understanding is sufficient to enable a person to form a reasonable opinion as to the effect of keeping a horse on a train for a period of fifty-seven hours, tied with two ropes, one from either side of the car with its head toward the center of the car, and the admission of such testimony was not error.
5. ———: Evidence: Production of Papers. The admission of evidence of notice to defendant to produce certain documents and papers did not greatly prejudice the defendant, as there was no attempt to prove a different case from that shown by exhibits actually produced during the trial.

Appeal from Jackson Circuit Court.—*Hon. E. E. Porterfield, Judge.*

AFFIRMED.

M. A. Low and Sebree, Conrad & Wendorff for appellant.

The demurrer should have been sustained for the reasons: The evidence wholly failed to show the horses were not fed, watered and cared for in transit; assuming they were not fed, watered and cared for in transit, the evidence failed to show that that fact caused the death of the horse. *McGrath v. St. L. Transit Co.*, 197 Mo. 97, *Purcell v. Tennent Shoe Co.*, 187 Mo. 276, *Goransson v. Mfg. Co.*, 186 Mo. 300; *Harper v. Terminal Co.*, 187 Mo. 575; *Demaet v. Storage, Packing, etc., Co.*, 121 Mo. App. 92; *Caudle v. Kirkbride*, 117 Mo. App. 412. Plaintiff did not notify defendant of injury to the horse in question as provided by section 7 of the live stock contract. *Smith v. Railroad*, 112 Mo. App. 610; *Freeman & Hinsin v. Railroad*, 118 Mo. App. 526; *Letts v. Railroad*, 131 Mo. App. 270; *Shelton v. Railroad*, 131 Mo. 560.

Guthrie, Gamble & Street and *J. M. Rader* for respondent.

BROADBUSH, P. J.—This is an action to recover damages for the alleged negligence of the defendant in

the shipment of two Percheron stallions on October, 15, 1906, by Singmaster & Sons, as agents of plaintiff from Keota, Iowa, to Meta, Missouri.

The petition of plaintiff is based upon the negligence of the defendant in failing to unload, feed and water and to allow said horses to rest in transit, and that in consequence of such negligence, one of said horses died.

The defendant's answer was a general denial of the allegations of the petition; and that under the terms of the contract of shipment plaintiff assumed all risk and expense of feeding, watering, bedding and otherwise caring for said horses while in defendant's cars, yards, pens or elsewhere; and that he would unload them at his own expense; and that as a condition precedent to his right to recover any damages, plaintiff agreed that as soon as he discovered any loss or injury to said horses he would give notice thereof in writing to some general officer, claim agent or station agent or defendant, before said horses were removed from the point of shipment, etc.; and that such notice should be served within one day after the delivery of the horses at their destination, etc.; that plaintiff failed to give such notice within the time provided for in said contract; and that plaintiff agreed that in no event defendant should be liable for more than one hundred dollars for each animal.

Plaintiff replied that said provisions in said shipping contract set up by defendant were void under section 2074, Code of Iowa; and that there was no consideration for any of said provisions attempting to limit defendant's liability as a common carrier; that defendant gave plaintiff no opportunity for feeding, watering and caring for said horses; and that defendant's agent saw the condition of the horses as soon as they were taken off the train at their destination.

The evidence showed that on October 15, 1906, at 6 o'clock p. m., Singmaster & Sons, as agents of plaintiff,

in compliance with a telegram sent by plaintiff from Trenton, Missouri, shipped the two horses for plaintiff from Keota, Iowa, to plaintiff at Meta, Missouri. The contract of shipment provided that plaintiff assumed all risk and expense of feeding, watering and caring for the horses while in cars . . . and would load and unload the same at his own expense and risk; that as a condition precedent to the bringing of any suit for damages for any loss or injury to the horses plaintiff would as soon as he discovered such loss or injury, promptly give notice thereof in writing to some general officer, claim agent or station agent of defendant before said horses were removed from the point of shipment or place of destination, which should be served within one day after the delivery of the stock at its destination, in order that such claim may be fully and fairly investigated.

Singmaster & Sons prepared the car by putting a little hay therein, for the horses to stand upon, loaded and tied the horses in each end of the car, the heads towards the center of the car, with two ropes, one from either side of the car, on each horse.

Plaintiff in his telegram to Singmaster & Sons, directed them to wire him when loaded. He remained at Trenton intending to meet the horses there and go with them to Meta, and feed, water and care for them in transit, but plaintiff failed to receive such notice of the time of the shipment of the horses, and they arrived at and passed through Trenton without plaintiff's knowledge. When he learned that the horses had passed through Trenton he took the next passenger train and arrived at Meta about 3:30 o'clock a. m., October 18th. The horses arrived on the 17th of October, at 9 o'clock p. m., when the car was set at the chute for unloading. Meta is a small place, where defendant employed only a station agent and had no yard crew. When plaintiff arrived at Meta he untied the horses so that they could lie down, watered and fed them and left for a short time,

when he returned without saying anything about what he intended to do he took the horses out of the car and to the livery stable and fed them again. Afterwards, he led the horses to a small creek and into eight or ten inches of water four or five times a day for about two or three days. On or about the 20th, one of them showed symptoms of lung fever or pneumonia. On the following day plaintiff began to doctor the horse with linseed and castor oil, and the next day gave him ten or twelve drops of aconite every three hours until he died. He also gave him laudnum.

It was shown that the horses were tied in such a manner that they could not eat of the hay put in the car and that they were so tied that they could not lie down.

The plaintiff's evidence tends to show that the horses were not fed or watered during transit, while that of defendant tends to show that they were fed and watered. There was evidence, however, of a positive character that they were fed and watered a short while before they reached their destination.

Plaintiff's evidence tended to show that the treatment the horses received while in transit would probably cause them to become diseased and that lung fever or pneumonia with which one of them died was the probable result of such treatment.

The defendant sought to show that the medicine that plaintiff administered to the horse and allowing him to go into water eight or ten inches deep to drink, were the procuring causes of the death of one of them.

The distance from Keota to Meta is about 322 miles, and the time in which the horses were in transit was about fifty-seven hours.

Plaintiff testified that when he took the horses from the car, "they were badly shrunk and drawn, . . . and that they were so sore they could hardly get out to the track. Their heads down. They were in very bad condition."

The shipping laws of the State of Iowa were introduced in evidence over the objections of defendant.

The plaintiff was permitted over the objection of defendant to read a notice to produce the way bill of the car described, a copy of which was attached to defendant's answer and other documents and letters alleged to be in defendant's possession.

Plaintiff was also allowed over the objection of defendant to prove what effect the keeping of a horse on a train for fifty-seven hours and forty minutes, tied in the position as shown that he was tied, without food and water, based on his experience in handling and shipping horses, would have on it. The witness had stated that he had had experience in shipping horses.

The paragraph in the contract in relation to rate and tariff reads as follows: "One car, said to contain two stallions, from Keota station, to Meta, Mo., station, consigned to A. McKinstry, Meta, Mo., at the rate of trf. per 100, from—— to——, subject to minimum weight and length of cars specified and provided for in the tariff; said rate being less than the rate charged for shipments transported at carrier's risk, for which reduced rate and other considerations it is mutually agreed between the parties hereto as follows," etc.

The plaintiff recovered judgment and the defendant appealed.

We will first consider the preliminary question of the plea in bar interposed by the defendant of the failure of plaintiff to give notice of his loss as provided by the contract. It is held that such stipulations in a contract of shipment are not in contravention of public policy and are therefore valid, but, "that they must be reasonably and justly construed in their application to the particular facts of each case." [Ward v. Mo. Pac. Ry. Co., 158 Mo. 226; Holland v. Railroad, 139 Mo. App. 702.]

The plaintiff under the circumstances in proof could not have given notice of his loss within one day

after the arrival of the horses at their destination, as the extent of such loss was not manifest until several days thereafter. He did not and could not know upon their arrival that one of them would develop a fatal case of pneumonia, therefore, such provision in the contract of shipment was no defense to an action thereon. [Burns v. Ry. Co., 132 S. W. 1.]

And it is held, under the provisions of the amendment to the Interstate Commerce Act, known as the Hepburn Bill, a carrier cannot contract with the shipper for interstate transportation of freight, whether supported by a good consideration or not, affecting any part of the carrier's common-law liability. [Holland v. Railroad, 139 Mo. App. 702; Blackmer & Post Pipe Co. v. Railroad, 137 Mo. App. 479.]

However, the Springfield Court of Appeals holds, that, the foregoing rule does not apply to interstate shipments. [McElrain v. Railway, 131 S. W. 736.] As that case is in conflict with the two cases cited the court has certified it to the Supreme Court.

Whether such conditions are valid when supported by a valuable consideration, it is the well-settled law of this state that notwithstanding the recitation in a contract of shipment that such conditions are made in consideration of a reduced rate, if there is no such reduced rate or other valuable consideration the carrier is liable just as if the contract had contained no such stipulations. [George v. Railroad, 214 Mo. 551; Ward v. Railroad, *supra*.]

And the recitation in the contract specifying the price for transportation to be, "at the rate of trf. per 100" means that the shipment was at the regular schedule tariff rates in the absence of evidence that the rate was in fact a reduced rate. [George v. Railroad, *supra*.]

The holding of the Springfield Court of Appeals does not apply to the contract in this case, because it is different from the one there considered, and different from that in the George case, *supra*.

It is a rule of law, that a contract is to be interpreted by the law of the place where made. The law of Iowa introduced in evidence where the contract was made provides that: "No contract, receipt, rule or regulation shall exempt any railway corporation engaged in the transportation of persons or property, from the liability of a common carrier, or carrier of passengers, which would exist had no contract, receipt, rule or regulation been made or entered into."

The defendant insists that as the contract was not to be executed in Iowa but in Missouri, the law of the latter is to control. The case of *Greason v. Ry. Co.*, 112 Mo. App. 116, cited by appellant, has no application to the question. In *Bigelow v. Burnham*, 83 Iowa 120, where a note was executed in one state and made payable in another, held, that the laws of the latter governed. And to the same effect is the holding in *Hall v. Cordell*, 142 U. S. 116, and such in the conceded law.

The rule applicable is otherwise. "A contract of affreightment is governed by the law of the place where it is made, unless it appears it was otherwise intended by the parties." [*Otis Co. v. Ry. Co.*, 112 Mo. 622.] Whether we apply the law of this state, of Iowa or the Hepburn Bill of Congress, the provision for notice is invalid.

One of the errors assigned in the admission of testimony was in permitting plaintiff to testify as to the effect of keeping a horse on a train for a period of 57 hours, tied as the one in question was shown to have been. Plaintiff was shown to have had such experience as qualified him to testify as to that matter. In our opinion the common understanding of ordinary minds would enable a person to form a reasonable opinion upon the hypothesis. It is reasonable to infer that the horse sickened because of his weakened powers of resistance to disease. [*Gilbert v. Railroad*, 132 Mo. App. 687.]

It is argued that the court committed error in permitting plaintiff to introduce in evidence the notice to defendant to produce certain documents and papers. The notice was read after defendants failed to account for or produce the documents called for therein.

It is said that this question has not been passed on by any of the appellate courts of this state. There are some authorities that hold under the circumstances that such is competent evidence. It is said that: "The mere withholding or failing to produce evidence, which under the circumstances would be expected to be produced and which is available, gives rise to a presumption against the party." [Jones on Evidence, sec. 17.] And similarly in *Clifton v. U. S.*, 4th Howard 242. However the law may be, we are of the opinion that defendant could not have been greatly prejudiced thereby, as there was no attempt upon the part of plaintiff to prove a different case from that shown by the exhibits actually produced during the trial.

Finally it is contended that upon the whole record it was not shown that the disease which was the cause of the animal's death was produced by the treatment he received while in transit. It is argued that the expert testimony failed to establish that fact; and that the evidence was to the effect that the disease was the result of taking him to a stream of less than a foot in depth for the purpose of giving him water.

If we have read the record correctly and we believe we have, the preponderance of all the evidence including that of the experts, tends to show that the disease which the horse contracted from the effects of which he died, was traceable to his treatment while in transit. One expert did testify, however, that it was not a proper treatment to let the horse go even in shallow water while he was so afflicted, but none of them testified that the disease was the probable result thereof. And the common understanding of every person who has had much to do with horses, is that letting a horse go into

water reaching scarce above his hoofs could have little or no effect upon his health. And there was ample evidence that the horses were deprived of water, food and rest during their transit. Finding no material error in the trial, the cause is affirmed. All concur.

JAMES W. GORDON, by next friend, Respondent, v.
METROPOLITAN STREET RAILWAY COM-
PANY, Appellant.

Kansas City Court of Appeals, January 30, 1911.

1. **APPELLATE PRACTICE: Demurrer to Evidence: Contributory Negligence.** Where, at the close of plaintiff's evidence, and at the close of all the evidence, defendant asked the court to direct a verdict in its favor, but these requests were refused, and the cause was submitted to the jury on the sole issues of whether the peril of the deceased was caused by the negligent manner in which the car was operated, or was caused wholly or in part by the negligence of the deceased, defendant is not bound by the submission in its instructions of contributory negligence as an *issue of fact*, but, if defendant preserves its exceptions, it may return in the appellate court to its demurrer to the evidence, and present the question whether the excessive speed at which the car was negligently operated was the sole cause of the injury, and deceased was not guilty *in law* of contributory negligence.
2. ———: **Instructions: Humanitarian Doctrine.** Where plaintiff asked no instructions, and did not object to those given at the request of the defendant, among which was an instruction that there was no evidence in the case that defendant's motor-man running and operating the car which struck deceased, could have stopped or checked the speed of the car, after deceased placed himself in a position of peril, in time to have avoided the injury. *Held*, that plaintiff, in effect, approved the instruction as given, and thereby admitted that the evidence most favorable to plaintiff would not sustain the charge of negligence under the humanitarian doctrine, and that on appeal plaintiff cannot renounce that position.

- 3. CARRIERS OF PASSENGERS: Contributory Negligence.** Where the street car which inflicted injuries from which plaintiff's father died, must have been from 900 to 1000 feet away when deceased first saw the car, and at that time was running at a speed of from thirty-five to forty miles per hour, and was not coming head on, but at an angle, and deceased took a second look when he was in a place of safety, which look, if taken, would have told an ordinarily careful man in his situation that the car was not then to exceed seventy-five feet away; that it had traveled a distance fifteen times greater than he had traveled in coming from the sidewalk; that it was not checking speed, and that a collision would be unavoidable, if he attempted to cross in front of the car. *Held*, that the conduct of the deceased was negligence in law that precludes a recovery.
- 4. ———: ———: Excessive Speed of Car.** The duty of deceased, to pay close attention to his way over the tracks, was a continuing duty, and he was not excused from the performance of that duty by the presumption that he was entitled to indulge that the car would not be run faster than twenty miles an hour (the speed provided in the city ordinance) and at that speed was too far away to menace him.
- 5. APPELLATE PRACTICE: Cause Remanded: Humanitarian Doctrine.** Although the issue of negligence under the humanitarian doctrine was abandoned by plaintiff in the trial of the case, where, in the opinion of the appellate court, the evidence was such that the trial court would have been justified in submitting that issue, had it not been abandoned, it is but just to remand the cause, and give plaintiff an opportunity to have his case tried on the only tenable ground.
- 6. CARRIERS OF PASSENGERS: Humanitarian Doctrine: Excessive Speed.** Where a motorman is approaching a crossing at highly excessive speed, with the purpose of running by a regular stopping place, where people are waiting for his car, he has no right to indulge in the presumption that a pedestrian, who was one of a straggling group of persons slowly crossing the street, would stop in a place of safety, but the motorman should have apprehended that deceased might be surprised and imperilled by his recklessness. Hence, if the same evidence be adduced at a subsequent trial, the issue of "last chance" negligence should be sent to the jury.

Appeal from Jackson Circuit Court.—*Hon. W. O. Thomas, Judge.*

REVERSED AND REMANDED.

John H. Lucas for appellant.

(1) The court erred in submitting the cause to the jury. The deceased was guilty of contributory negligence, such as to preclude a recovery herein. *Degonia v. Railroad*, 224 Mo. 587; *Boring v. Railroad*, 194 Mo. 548; *Stotler v. Railroad*, 204 Mo. 628; *Green v. Railroad*, 192 Mo. 137; *Rodan v. Transit Co.*, 207 Mo. 411; *Laun v. Railroad*, 216 Mo. 599; *Holland v. Railroad*, 210 Mo. 351; *Schmidt v. Railroad*, 191 Mo. 228; *Cole v. Railroad*, 121 Mo. App. 609; *Zalotuchin v. Railroad*, 127 Mo. App. 584; *Grout v. Railroad*, 125 Mo. App. 559; *McCreery v. Railroad*, 221 Mo. 32; *Gamm v. Railroad*, 141 Mo. App. 313; *Dey v. Railroad*, 140 Mo. App. 469.

(2) Error in refusing to give instruction No. 7. The deceased saw the car approaching and was chargeable with the consequences of such knowledge. *Gumm v. Railroad*, 141 Mo. App. 314; *Cole v. Railway*, 121 Mo. App. 610; *Laun v. Railroad*, 216 Mo. 580.

Boyle & Howell for respondent.

(1) Where an ordinance regulates the rate of speed of street cars through the streets of a city, and the street railway company wantonly, knowingly and recklessly violates such ordinance, and operates a car at a dangerous and deadly rate of speed, a pedestrian attempting to cross a street along which said car is operated and in the exercise of ordinary care for his own safety, may presume that persons in control of such car are obeying the ordinance. *Hutchinson v. Railroad*, 161 Mo. 246; *Eswin v. Railroad*, 96 Mo. 290; *Kellny v. Railroad*, 101 Mo. 77; *Jennings v. Railroad*, 112 Mo. 268; *Gratoit v. Railroad*, 116 Mo. 540 *Sullivan v. Railroad*, 117 Mo. 214; *Riska v. Railroad*, 180 Mo. 168; *Weller v. Railroad*, 164 Mo. 199; *Johnson v. Railroad*, 203 Mo. 402. (2) Even if the court should find that defendant had negligently placed himself in a position

of peril, the humanitarian doctrine applies to the facts in this case and plaintiff is entitled to recover by reason thereof. *Cole v. Railroad*, 121 Mo. App. 605; *Grout v. Railroad*, 125 Mo. App. 552; *Dahmer v. Railroad*, 136 Mo. App. 443; and cases cited in Point 1.

JOHNSON, J.—Plaintiff, the minor son of James Gordon, deceased, sued to recover damages for the death of his father which he alleges was caused by the negligence of defendant. At the time of his death Gordon was a widower and plaintiff was his only minor child. The cause is here on the appeal of defendant from a judgment of two thousand dollars recovered by plaintiff in the trial court.

Gordon was killed near the intersection of Twenty-fourth street and Grand avenue in Kansas City, shortly after eight o'clock in the evening of September 22, 1908, as he was crossing Grand avenue, a busy public thoroughfare. A north-bound electric car on defendant's "Westport line" struck him and inflicted injuries from which he died. Grand avenue runs north and south, the numbered streets east and west. Twenty-fifth street is 761 feet south of Twenty-fourth street and between them, at a point 418 feet south of Twenty-fourth street, the course of Grand avenue deflects to the southwest and continues on a tangent in a southwardly direction. The street car tracks, two in number, make a curve at this point to conform with the course of the street.

Gordon and plaintiff lived in the basement of a building on the west side of Grand avenue, a short distance north of Twenty-fourth street. His daughter, her husband and her mother-in-law had been paying him a visit and had left his home accompanied by him for the purpose of boarding a north-bound street car. The party proceeded to cross Grand avenue to the northeast corner of that street and Twenty-fourth street which was a regular stopping place for cars running north. The

women walked some distance ahead, crossed the car tracks, stopped at the usual stopping place for passengers and signalled the approaching car to stop. Witnesses for plaintiff say the car which ran on the east track came on at from thirty-five to forty miles per hour and ran by Twenty-fourth street without slackening speed and without ringing the bell. Gordon and his son-in-law walked a few paces behind the women. They left the curb on the west side of the street at a point about 100 feet north of Twenty-fourth street and proceeded in a diagonal course towards the stopping place for passengers described. Their direction was southeast and they traveled sixty feet in going from the curb to the track on which the car was running. The son-in-law testified that they walked slowly, perhaps at the rate of two or two and one-half miles per hour, and that just as they started to cross the street they looked south and saw the car more than a block away—from 700 to 1000 feet from the place of the collision and that it was "just coming around the curve." As they stepped from the sidewalk one of the women called back to them, "Here comes the car now." The car had an electric headlight and electric lights inside. The witness states they did not and could not observe the speed of the car but that when they reached the west track—were just stepping on that track—they looked again and saw the car. He would not state how far away it was then but said, "it was quite a little ways up the track yet." They kept on as before, the witness half a step in front of Gordon. As the witness reached the middle of the east track, he realized the car was rushing on them. He hallooed and jumped back far enough for the car to clear him as it rushed by. Gordon, heeding the cry, also jumped back but not far enough. The end of the bumper or the projecting handrail struck him and hurled him to the pavement.

An ordinance of the city pleaded and introduced in evidence prohibited street cars from running at a great-

er speed than twenty miles per hour and the petition charges that defendant's negligence in running the car at excessive speed and in violation of the ordinance was the proximate cause of his father's death. The petition further alleges that Gordon "was in a position of peril and danger of which the defendant well knew, or by the exercise of ordinary care might have known in time to have stopped said car and avoided striking said deceased."

The answer is a general traverse and a plea of contributory negligence. The motorman of the car testified:

"On the evening of the 22d day of September, 1908, I was in the employ of the Metropolitan Street Railway Company as a motorman and was running and operating a Westport car. When I got to Hunter avenue and Main street I got off the car and went in a drug store to telephone to the car barn, and when I got there there was a young lady using the phone and I was delayed about five minutes. By this time there were some other cars close behind me. I went from Hunter avenue into Main street, and started north on Main street. I made the stop at Thirty-first street. After that I made no stop until I passed Twenty-fourth street. It was just about or a little after eight o'clock at night. The car was full of people who seemed to be like theatre people going to a theatre. The reason I made no stop was because no one wanted to get off, and the other cars were following so close behind. My car was running pretty fast and was coming down grade. I did not intend to stop my car to take up any passengers because I was behind time, and the other cars were following close behind me. After leaving Twenty-seventh street I was ringing my alarm bell with my foot to warn people of the approach of the car, and show people the car was not going to stop. I was running this way and looking directly in front of me, as I came around the curve at or near Twenty-fifth street; as I came around the

curve north of Twenty-fifth street. At this point on Grand avenue the track is straight and runs due north from that point. The street was well lighted; just as I turned the curve north of Twenty-fifth street I saw the man who was struck with some other gentleman with him, I also saw at the same time some people standing on the corner on the north side of Twenty-fourth street and on the east side of Grand avenue. They crossed over the north-bound track just as I turned the curve. At that time the two men were some feet west of the track. These people on the east side of the street saw that my car was not going to stop and someone held up his hand or something as if to get me to stop, but I did not intend to make the stop and kept my foot on the alarm bell to notify them of that fact and rang it more violently and oftener than before. When I first saw these two men I was ringing this bell, they looked toward my car as if to stop, and I thought from their movements they were going to stop, I kept ringing my bell and made no effort to stop the car until I was in about a car length of these men when I reversed my power and turned on the air and applied the sand. It was too late, however, the young man jumped back and was not struck, the old man was hit by the handhold on the front end of the car and knocked down. The handhold of the car was badly bent by the blow. My car ran fully nearly to Twenty-third street before I could stop it. After I saw this man was not going to stop I did everything I could to stop the car. I was sounding this bell all the time I was coming down from Twenty-fifth street and was in plain view of these two men. I saw them plainly and they saw me. They looked that way and I thought they heard the gong I was ringing, when these people on the corner held up their hands for me to stop I rang the gong more violently than before. The fender did not hit the old man at all, but it was the handhold on the side of the car.

After I stopped my car I backed up to where the man was struck, just as some men were carrying him over to the sidewalk. When I first saw these men they were not going straight across the track, but they were going diagonally at a point north of Twenty-fourth street, and were *kinder* facing me. There was nothing in their actions or movements to indicate to me that they did not see my car, and I did not know that they were not going to stop until I was within a car length of them, after I saw they were not going to stop I did everything in my power to stop. The men were in plain view of me all the time and I saw and was looking at them all the time after turning in the curve north of Twenty-fifth street."

At the close of plaintiff's evidence and at the close of all the evidence the defendant asked the court to direct a verdict in its favor but these requests were refused and the cause was submitted to the jury on the sole issue of whether the peril of the deceased was caused by the negligent manner in which the car was operated or was caused wholly or in part by negligence of the deceased. The issue of negligence under the "last chance" doctrine was withdrawn from the jury in an instruction given at the request of defendant and, as later we shall show, was abandoned by plaintiff. The record discloses a novel situation respecting the submission of the cause to the jury. Plaintiff asked no instructions and did not object to those given at the request of the defendant which were numerous enough and which included the following:

"The court instructs the jury there is no evidence in this case that the defendant's motorman running and operating the car which struck deceased, could have stopped or checked the speed of his car, after deceased placed himself in a position of peril, in time to have avoided the collision and injury to deceased and hence the plaintiff cannot recover on that ground."

Since plaintiff asked no instructions and did not object to the giving of the instruction quoted, in effect, he approved it and agreed with defendant that it correctly declared the law and that the evidence most favorable to plaintiff would not sustain the charge of negligence under the humanitarian doctrine. Plaintiff is bound to the position he thus selected of his own volition in the trial court and will not be heard to renounce that position and shift to another in this court. No rule is better settled than that which holds a plaintiff in the appellate court to the theory on which he tried the cause. On the other hand, defendant is not bound by the submission in its instructions of contributory negligence as an issue of fact. Defendant was driven to take this position by the adverse rulings of the court on its demurrers to the evidence which challenged plaintiff's right to recover on any hypothesis and presented the question of contributory negligence as one of law. Driven from one line of defense in the trial court, a defendant may fall back to another but if he preserves his exceptions (as defendant did in the present case) he may return in the appellate court to his first position. Therefore defendant, despite its instructions, may return here to its demurrer to the evidence and again challenge the right of plaintiff to recover on any theory of the case. In this view of the situation of the parties the judgment cannot stand on the charge of negligence under the humanitarian rule but must rest on the only remaining allegation of negligence, i. e., that the excessive speed at which the car was negligently operated was the sole cause of the injury and the deceased was not guilty in law of contributory negligence.

The negligence of defendant in running the car over a busy street at the speed of an express train is too apparent and indisputable for argument and we shall waste no words on that subject. But we think that negligence, to the extent that it operated to entrap and

imperil the unwary pedestrian, was assisted by his own contributory negligence, of the existence of which the record affords no room for reasonable difference of opinion. The duty of the deceased to pay close attention to his way over the tracks was a continuing duty and he was not excused from the performance of that duty by the presumption he was entitled to indulge, that the car would not be run faster than twenty miles per hour and at that speed was too far away to menace him. The law did not require him to look at the car constantly, but it did require him to give it ordinary attention and if such attention would have disclosed the reckless speed and manner in which it was being operated, he had no right to presume anything at variance with the plain facts within his observation. The statement of the son-in-law that they could not know until the instant before the collision that the car was running at excessive speed and was in striking distance, must be rejected for the reason that it is conclusively disproved by the undisputable facts of the situation. The car must have been from 900 to 1000 feet away when deceased was at the place where the witness says they first looked. It was not coming head on but was running at an angle that gave a view of its broadside of illuminated windows. The fact that it was running fast was apparent and must have been known to them if they looked. If these were all the facts one still might think there was some room for doubt concerning the negligence of the deceased. But all is removed by the further fact that the second look of the deceased was taken when he was in a place of safety on the west track and that look, if taken, would have told an ordinarily careful man in his situation that the car was then not to exceed seventy-five feet away; that it had traveled a distance fifteen times greater than he had traveled in coming from the sidewalk; that it was not checking speed and that a collision would be unavoidable if he attempted to cross in front of it. One of two conclusions is irre-

sistible. Either the two men did not look at all or, looking, gave no heed to what they saw. In either case the conduct of the deceased was negligence in law that precludes a recovery on the issues sent to the jury and compels a reversal of the judgment.

However, we shall remand the cause for the following reason: Though the issue of negligence under the humanitarian rule was abandoned by plaintiff at the last and is not now in the case, the evidence, we think, would have justified the court in submitting the issue had it not been abandoned, and it is but just to plaintiff to give him an opportunity to have his case tried on its only tenable ground. Doubtless the court, in ruling on the demurrer to the evidence, indicated the view of the law of the case, expressed in the instructions afterward given, and though plaintiff was not driven to the acceptance of that view, it would be an unnecessarily harsh rule that would deprive him of a fair opportunity to be heard on the real merits of his case. The jury well might have believed from the evidence that an ordinarily careful and humane man in the position of the motorman would have realized the peril of the deceased in time to have avoided the injury by checking speed or sounding an alarm with the gong. Where a car is approaching a crossing at ordinary speed a motorman may be justified in assuming that a pedestrian coming towards the crossing will stop in a place of safety and, in such case, would be under no duty to act on the contrary supposition until something in the appearance of the pedestrian indicated that he was going into danger. But where, as here, the motorman is approaching a crossing at highly excessive speed with the purpose of running by a regular stopping place, where people are waiting for his car, he has no right to indulge in any presumptions. Such conduct is extraordinary and calls for the exercise of extraordinary care to prevent it from becoming an agency of danger to others. Seeing a straggling group of persons slowly crossing the street

he should have apprehended that they might be surprised and imperilled by his recklessness. He had no right to arrogate to himself a paramount right to the street and compel others to take care of themselves or be injured. Under the peculiar circumstances of this case the presence of people on the street approaching the track was a danger signal which ordinary prudence would have dictated to the motorman to heed. The evidence of plaintiff would warrant the indulgence of such conclusion by the triers of fact and if the same evidence be admitted at subsequent trial the issue of "last chance" negligence should be sent to the jury.

The judgment is reversed and the cause remanded. All concur.

**ARTHUR PENNELL, Respondent, v. CHICAGO,
ROCK ISLAND and PACIFIC RAILWAY COM-
PANY, Appellant.**

Kansas City Court of Appeals, January 30, 1911.

1. **CARRIERS OF PASSENGERS: Railroads: Evidence.** In an action for personal injuries, where plaintiff's statement that the train was not in sight is contradicted by all the witnesses, and by the plain physical fact that the train must have been at or near a point in plain view of plaintiff, and not over sixty feet from the place of collision, the appellate court cannot accord any evidentiary weight to plaintiff's statement.
2. ———: ———. Where plaintiff, had he looked, must have seen the defendant's train in time to have avoided the perilous position in which he discovered himself when too late to avoid injury, his own evidence affords him no cause of action on account of negligence of defendant which may have co-operated to place him in danger.
3. ———: ———: **Humanitarian Doctrine: Burden of Proof.** Under the humanitarian or "last chance" doctrine, the burden is on the plaintiff to prove that defendant's servants saw or should have seen that he was going into a dangerous position, and was unmindful of the danger, and that defendant's ser-

vants had the means at hand for saving plaintiff, and had they made reasonable use of such means they would have saved him. The mere fact that the train causing the injury was being negligently run and struck plaintiff will not support an assumption that the negligence of defendant's servants was such that plaintiff's case should go to the jury.

4. **HUMANITARIAN DOCTRINE: Admission Against Interest.** Plaintiff's testimony, under the humanitarian doctrine that he was giving due attention to his way, and that he looked in the direction of the train causing the injury when at a place only ten or eleven feet from the danger line, is in the nature of an admission against his own interest. This evidence, coupled with the fact that there is no evidence tending to show an appearance of peril, until plaintiff actually entered on the path of the train made it error to overrule defendant's request for a peremptory instruction.

Appeal from Jackson Circuit Court.—*Hon. W. O. Thomas, Judge.*

REVERSED.

M. A. Low and Seabee, Conrad & Wendorff for appellant.

The court committed error in refusing the demurrer to the evidence. The court committed error in refusing the instruction in the nature of a demurrer offered by the defendant at the close of all the evidence. *Schaub v. Railroad*, 133 Mo. App. 444; *Schmidt v. Railroad*, 191 Mo. 215; *Green v. Railroad*, 192 Mo. 131; *Walker v. Railroad*, 193 Mo. 453; *Stotler v. Railroad*, 204 Mo. 619; *Hayden v. Railroad*, 124 Mo. 566; *Huggart v. Railroad*, 134 Mo. 679.

John L. Wheeler and John C. Nipp for respondent.

The court did not err in overruling defendant's demurrer, and the cause was properly submitted to the jury, and the judgment should be affirmed. *Kelley v. Railroad*, 75 Mo. 138; *Huckshold v. Railroad*, 90 Mo. 548, 2 S. W. 794; *Donohue v. Railroad*, 91 Mo. 357, 2

S. W. 424, 3 S. W. 848; Hilz v. Railroad, 101 Mo. 36, 13 S. W. 946; Harlon v. Railroad, 104 Mo. 381, 16 S. W. 233; Dickson v. Railroad, 104 Mo. 491, 16 S. W. 381; Kenney v. Railroad, 105 Mo. 270, 16 S. W. 837.

JOHNSON, J.—This is an action for damages for personal injuries alleged to have been caused by the negligence of defendant in the operation of one of its trains over a street crossing in Kansas City. The appeal is prosecuted by defendant from a judgment of one thousand dollars recovered by plaintiff in the circuit court where the cause was tried before a jury.

The injury occurred between eleven and twelve o'clock on the morning of December 7, 1908, at the intersection of Tenth and Hickory streets. Tenth street runs east and west and is occupied by four tracks of the Union Pacific Railway Company which are used by trains of defendant as well as by trains of the owner. The engine of a passenger train of defendant coming west from the union station on the main line (which was the third track from the south) struck plaintiff and inflicted the injuries of which he complains. The locality is in a business district and plaintiff, a mechanical engineer, was returning from a business visit to a manufacturing concern. He was a man past middle life but was in good health and in full possession of his senses. He walked with a cane but was not crippled and was active for a man of his age. He states, "I was in very good health and enjoyed very good health and could walk eight or ten miles if necessary. . . . My nervous system was quite good. . . . I was not walking fast; walking about two and one-half miles per hour."

He started to cross Tenth street from the southwest corner of its intersection with Hickory, and proceeded north on the west side of the latter street until he reached the first railroad track, where he stopped to allow an east-bound train on the second track to go by. As soon as that track was clear he resumed his pro-

gress and when on the second track, looked, so he states, east and west on the third track and saw no train approaching from either direction. He went on to the third track, the main line, and then for the first time became aware that a train was coming from the east and was almost upon him. He jumped back but not far enough to reach a place of safety. Some part of the locomotive struck his right leg and threw him away from the south side of the track. Witnesses for plaintiff estimate the speed of the train at eight to ten miles per hour and state that the bell of the engine was not ringing. There were gates at this crossing and a watch tower equipped with a gong to give warning of the approach of trains, but some of the witnesses say the gates were not down and the gong was silent.

Ordinances of the city limiting the speed of trains to six miles per hour and requiring the watchman stationed in the watch tower to give warning of approaching trains were pleaded in the petition and introduced in evidence. The negligence pleaded consists of the acts of running the train at speed in excess of that permitted by the ordinance and in failing to give warning either by ringing the bell of the engine or the gong on the watch tower.

Further it is alleged "that the defendant, its agents, servants and employees, saw, or by the exercise of ordinary care, skill and diligence, could have seen, plaintiff in a position of imminent peril of being struck by said locomotive, and train of cars, upon and in dangerous proximity to said track upon which said locomotive and train of cars were being run and operated, in time, by the exercise of ordinary skill and diligence, to have warned plaintiff of his danger by sounding the bell or whistle, of the approach of said locomotive and train of cars, and of his danger of being struck by said locomotive and train of cars in time, by the exercise of ordi-

nary care, skill and diligence, to have enabled plaintiff to have kept out, or gotten out, of said position of peril.”

We have stated the facts in evidence most favorable to the cause of action asserted and in the view we take of the cause find no occasion to refer to the evidence of defendant. We shall concede that the watchman in the tower was negligent in not giving warning and that the operators of the engine were negligent in running at excessive speed and in failing to ring the bell.

But such acts, in so far as they might have operated to lure plaintiff into a perilous position were commingled with negligence of plaintiff himself, the existence of which is indisputably established by his own evidence. At the time he says he looked to the east and saw no train he was about sixteen feet from the center of the main track and some ten or eleven feet from the danger line. At that moment the engine was not over sixty feet from the place of collision and was in plain view since the track was straight and level; there were no obstructions to vision, and it was broad daylight. Plaintiff's statement that the train was not in sight is contradicted by all the witnesses and by the plain physical fact that it must have been at or near the point we have stated. We cannot accord any evidentiary weight to that statement. To do so would be to give credence to what common experience and common sense pronounce impossible. Courts are not bound to give weight to that which has no weight, substance to that which is insubstantial, nor attempt to create something out of nothing. Had plaintiff looked towards the east he must have seen the train and if he failed to see what was in plain sight it was because he did not look. In either event his own negligence was the cause of the perilous position in which he discovered himself when too late to avoid injury. His own evidence affords him no cause of action on account of negligence of defendant that may have cooperated to place him in danger, and we pass to the

question of whether he has a case to go to the jury under the rules and principles of the humanitarian doctrine.

The burden is on the plaintiff to prove that defendant's servants—the operators of the engine or the watchman—saw or should have seen that he was going into a dangerous position and was unmindful of the danger and that they had the means at hand for saving him and had they made reasonable use of such means would have saved him. We have no right to assume from the mere facts that the train was being negligently run and struck plaintiff that defendant's servants were guilty of negligence under the "last chance" doctrine. To support a cause of action founded on such negligence, it must appear affirmatively from the evidence that there was something in the appearance of plaintiff as he approached the track to disclose that he was unaware of the presence of the train and if not specially warned would proceed heedlessly into danger. So far as plaintiff's testimony is in the nature of an admission against his own interest, we take him at his word. He asserts that he was giving due attention to his way and that he looked in the direction of the train when at a place only ten or eleven feet from the danger line. Grant that defendant's servants should have been observing him, what was there in such conduct to suggest to ordinary care that he was oblivious to his real situation? His action showed he knew what he was doing and the engineer certainly was justified in acting on the belief that a man who looked directly at the approaching train and was in apparent possession of unimpaired faculties, would not deliberately walk into danger but would stop in a place of safety. There is no evidence tending to show an appearance of peril until plaintiff actually entered on the path of the train. At that moment the train was not over twenty-five feet from the place of collision and the engineer, had he been never so diligent, could have done nothing to save the unfortunate man. In his zeal to exculpate himself from the imputa-

tion of negligence, plaintiff has pictured a situation free from the suggestion of peril until a time when knowledge thereof would have been unavailing. As we said before, we shall hold him to his admissions and in so doing we say that he cannot hold defendant liable for the failure of its servants to observe a thing his own evidence shows was not open to observation.

The learned trial judge erred in overruling defendant's request for a peremptory instruction. The judgment is reversed. All concur.

BELLE J. AUGUSTUS et al., Respondents, v. THE CHICAGO, ROCK ISLAND & PACIFIC RAILWAY COMPANY et al., Appellants.

Kansas City Court of Appeals, January 30, 1911.

1. **CARRIERS OF PASSENGERS: Injury at Crossing: Negligence of Motorman.** Plaintiff was injured in a collision between the car of the defendant street railway company and a freight train of the co-defendant railway company. The collision occurred at a crossing at which was a flagman employed by the co-defendants. *Held*, that it was the duty of the motorman to hold his car in a place of safety until the crossing was clear, i. e. until it was beyond action of the train, resulting either from its recoil, or the reversing of its engine, and the motorman was negligent in attempting to cross the track whether the signal that he received from the flagman was to proceed or to remain stationary.
2. **——: Agency: Flagman at Crossing.** A flagman who was hired by one of three railroad companies, but who was maintained at the crossing where the injury occurred at the equal charge of the street railway company, and the three railroad companies, one of whom was a co-defendant of the street railway company in this action, so far as the plaintiff was concerned, is the agent of the street railway company who is answerable for his negligence.
3. **——: Pleading: General Allegation of Negligence.** Where the only specification of negligence as to a street railway com-

pany was that it "so negligently constructed, maintained, and operated its car line, and the car on which plaintiff was a passenger," etc., the allegation is general, and not specific, and under such an averment the plaintiff might recover on any conceivable negligence of the company that could have caused the collision.

4. ———: **Evidence: Negligence Generally Alleged: Burden of Proof.** Where only general negligence is charged, plaintiff is not required to adduce proof of specific negligence, but makes out a *prima facie* case by proving that she was injured by the collision. The burden of proof then shifts to the carrier of showing that the collision was not caused by its negligence, but was due to unavoidable accident, or the negligence of others.
5. ———: **Pleading: General Allegation of Negligence.** Where the allegations of negligence as to the first co-defendant are general, the fact that plaintiff made specific averments of negligence as to the second co-defendant, will not convert the averment of negligence on the part of the first co-defendant from a general to a specific charge.
6. ———: **Injury at Crossing: Duty of Motorman.** With or without warning from the brakeman of a train switching on a crossing, it is the duty of a motorman to know of the presence of the train, and not to attempt to cross as long as it is in striking distance.
7. ———: **Instructions.** Where the verdict of the jury is also against the second of two co-defendants, the first co-defendant cannot on appeal object to instructions that were too favorable to the second co-defendant.
8. ———: **Railway Crossing: Duty of Railroads.** In an action for injuries caused by a collision at a crossing, it devolves upon defendant railway company to take into consideration, in the exercise of ordinary care, the fact that it was running its train over a busy street in rightful use by pedestrians and vehicles, and not to approach the crossing without giving warning, and not to do anything in the running of the train which unnecessarily would enhance the natural and inherent dangers and risks attending the switching of freight trains over a grade crossing.
9. ———: ———: **Negligence of Railroad.** Where there was no apparent necessity for the stopping of a train at a place where the taking up of slack in the train would clear the crossing, and the reaction would cause the end car to return to the crossing, and where the movement of the train away from the crossing, was caused by the taking of slack—a fact which was peculiarly within the knowledge of the trainmen, the defend-

ant railway company was not in the exercise of reasonable care in stopping at a place where the train would "kick back."

10. ———: ———: **Concurring Negligence.** The fact that the motorman in the employment of the co-defendant street railway company did not measure up to the required standard of care, does not excuse the negligence of the co-defendant railway company for its invasion of the rights of ordinary travelers on the street (including the plaintiff) whose duty to themselves was only that of exercising ordinary care.
11. ———: ———: **Specific Negligence of Railroad.** An averment of specific charges of negligence against the co-defendant railway company in that it negligently failed to warn the street railway company of the approach of its train is amply sustained by evidence that its rear brakeman, who knew the cars would recoil to the crossing, gave no warning of that fact, but left the safety of the passengers who were in no position to protect themselves, solely to the care of the motorman and flagman.

Appeal from Jackson Circuit Court.—*Hon. James H. Slover, Judge.*

AFFIRMED.

M. A. Low and Sebree, Conrad & Wendorff for appellant Chicago, Rock Island & Pacific Railway Company.

(1) The court should have sustained appellant Rock Island's, demurrer to the evidence, for the reasons: The respondent must recover, if at all, upon the negligence charged in the petition; and the evidence does not show any negligence whatever on the part of the Rock Island, and especially negligence in the manner charged in the petition. *McGrath v. Transit Co.*, 197 Mo. 97; *Foley v. McMahon*, 114 Mo. App. 442; *Hamilton v. Railroad*, 114 Mo. App. 504; *Feary v. Railroad*, 162 Mo. 75; *Bartley v. Railroad*, 148 Mo. 124. (2) The court should have sustained appellant Rock Island's, motion in arrest of judgment. (3) The jury disregarded the instructions given in behalf of appellant, Rock Island. The court committed error in not granting a new

trial because the jury disregarded the instructions given in behalf of the Rock Island. *Allen v. Transit Co.*, 183 Mo. 411; *Turnpike Co. v. Vivion*, 103 Mo. App. 324. (4) The court committed error in giving instruction 3 in behalf of respondents, for the reason that said instruction is not based upon nor warranted by the evidence. *Crow v. Railroad*, 212 Mo. 589; *Paddock v. Lomes*, 102 Mo. 226; *Kennedy v. Railroad*, 128 Mo. App. 297.

John H. Lucas for appellant Metropolitan Street Railway Co.

(1) Because the court erred in refusing to give the demurrer requested by this defendant at the close of plaintiff's case, and in refusing to peremptorily charge that the plaintiff could not recover as requested by this defendant. Under the pleadings and the evidence the plaintiff cannot recover. *Lenox v. Harrison*, 88 Mo. 495; *Ramsey v. Henderson*, 91 Mo. 565; *Weil v. Posten*, 77 Mo. 287; *Knoop v. Kelsey*, 102 Mo. 299; *Roscoe v. Railroad*, 202 Mo. 588; *Davidson v. Transit Co.*, 211 Mo. 361. (2) Because the court erred in giving instructions 1, 2, 3, 4 and 5 as requested by the plaintiff, each and all of which were erroneous, unsupported by evidence and tending to confuse and mislead the jury. See authorities sub-div. 1; *Connelly v. Railroad*, 133 Mo. App. 315; *Rodan v. Transit Co.*, 207 Mo. 409; *Schaub v. Railroad*, 133 Mo. App. 451; *Mockowitz v. Railroad*, 196 Mo. 571; *Roscoe v. Railroad*, 202 Mo. 588; *Toncrey v. Railroad*, 129 Mo. 602. (3) Because the court erred in giving instructions 3, 4, 5, 6, 7, 8, 9, 10, 11, 12 as requested by the Rock Island, each and all of them being unsustained in fact, confusing and misleading, and enlarging the issues between the plaintiff and this defendant. See above authorities; *Landrun v. Railroad*, 132 Mo. App. 721. (4) Because the court erred in refusing to give instruction 5 as requested by

this defendant. *Peck v. Transit Co.*, 178 Mo. 628; *Bond v. Railroad*, 110 Mo. App. 138; *Flaherty v. Railroad*, 207 Mo. 318; *Page v. Heat Co.*, 139 Mo. App. 544. (5) Because the court erred in giving instruction 5 of its own motion. See authorities 4. (6) Because the court erred in refusing to give instructions 8, 9 and 11 as requested by this defendant. *Wren v. Railroad*, 125 Mo. App. 606. (7) Because the verdict of the jury is excessive and the result of bias and prejudice on the part of the jury against this defendant. *Taylor v. Railroad*, 185 Mo. 239. (8) Because the court admitted improper evidence. *Keen v. Railroad*, 129 Mo. App. 301; *Thompson v. Keyes*, 214 Mo. 487.

A. F. Smith, Boyle & Howell and Guthrie, Gamble & Street for respondents.

(1) The happening of this accident raises the presumption that one or both defendants were negligent. *Kansas City, etc., Co. v. Stoner*, 49 Fed. 209; 3 *Thompson, Neg.*, sec. 2825. The Metropolitan is negligent as a matter of law. *Goodloe v. Met., etc., Co.*, 120 Mo. App. 194; *Railroad v. Tarin*, 108 Fed. 734; *St. Louis, etc., Co. v. O'Laughlin*, 49 Fed. 440. (2) A person using a crossing cannot rely entirely on a watchman. *Duncan v. Railroad*, 46 Mo. App. 198. A railroad company is responsible for the acts of a flagman jointly employed by it and other companies. 20 *Am. and Eng. Ency. Law*, 177; 2 *Thomp., Neg.*, sec. 1540; *Brow v. Railroad*, 157 Mass. 399, 32 N. E. 362; *Illinois, etc., Co. v. King*, 69 Miss. 852, 13 So. 824. (3) The doctrine of *res ipsa loquitur* applies in this case. *O'Gara v. Transit Co.*, 204 Mo. 724; *Wills v. Met., etc., Co.*, 133 Mo. App. 625. (4) The petition charged negligence generally. *Price v. Met., etc., Co.*, 220 Mo. 435; *Loftus v. Met., etc., Co.*, 220 Mo. 470; *Baskett v. Met., etc., Co.*, 123 Mo. App. 725; *McRae v. Met., etc., Co.*, 125 Mo. App. 562. Plaintiff could rely on a presumption of negli-

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gence. *Orcutt v. Century, etc., Co.*, 201 Mo. 424, 214 Mo. 35; *Price v. Met., etc., Co.*, 220 Mo. 435. Plaintiff had the right to plead negligence generally as to the Metropolitan and specifically as to the Rock Island. *McDonald v. Transit Co.*, 108 Mo. App. 374; *Wills v. Railroad*, 133 Mo. App. 625. (5) Railroad trains have the right of way over street cars. 3 Elliott on Railroads, sec. 1096 c. k. (6) Allegation of injuries will permit proof of the natural result thereof. *Van Cleve v. Railroad*, 124 Mo. App. 224; *Young v. Railroad*, 126 Mo. App. 1; *Burley v. Menefee*, 129 Mo. App. 518; *Neuer v. Met., etc., Co.*, 127 S. W. 669; *Moore v. Transit Co.*, 226 Mo. 689. (7) Objection to an enlargement of the issues must be preserved by affidavit. *Cossett v. Railroad*, 224 Mo. 97. (8) Plaintiff's instructions were correct. *Loftus v. Met., etc., Co.*, 220 Mo. 470. There was ample proof of a permanent injury. The verdict was not excessive. (9) A railroad using a street crossing must exercise care proportionate to the danger. *Zander v. Transit Co.*, 206 Mo. 445; *Compton v. Railroad*, 147 Mo. App. 414, 126 S. W. 821; *Frank v. Transit Co.*, 99 Mo. App. 323. It cannot rely entirely on the exercise of care by others. *Clark v. Railroad*, 129 Mo. 197, 212, 213. (10) The Rock Island instructions were erroneous. The verdict would not be invalid if it did not follow them. *Ericson v. Railroad*, 171 Mo. 647; *Haxten v. Kansas City*, 190 Mo. 53; *Moore v. Transit Co.*, 193 Mo. 411.

JOHNSON, J.—While plaintiff Belle J. Augustus, was a passenger on an electric street car operated by defendant Metropolitan Street Railway Company on the Argentine line of its street railway system in Kansas City, a collision occurred between the car and a freight train at a railroad crossing and plaintiff was injured. She sued the Street Railway Company, the Chicago, Rock Island and Pacific Railway Company—the owner

of the train—and the St. Louis and San Francisco Railroad Company, the owner of the track on which the train was running, to recover the damages, but during the trial she dismissed the last mentioned company and proceeded against the remaining defendants. The jury returned a verdict in her favor against both defendants and the cause is before us on their appeals from a judgment rendered on the verdict which was for four thousand five hundred dollars.

There is no suggestion in the evidence of any negligence on the part of the plaintiff who was seated in the car at the time of the collision. As is usual in such cases each defendant seeks to exculpate itself by casting blame for the collision on its co-defendant and, as we shall show, each has achieved the usual result of adducing proof of the actionable culpability of its companion in the suit without excusing itself.

The collision occurred in the daytime on Nineteenth street near the state line. This street runs east and west, is occupied by two street car tracks and is crossed at and near the state line by a number of railroad tracks. The east one of these tracks, called in evidence "The Frisco connection" curves from a switch in the Frisco yards south of Nineteenth street in a northeasterly course across the street and to a connection with tracks of the Rock Island Company running in an east and west course north of and parallel to Nineteenth street. A freight train consisting of twenty-eight cars and an engine pulled up from the west on one of the Rock Island tracks for the purpose of backing in on the connection to the Frisco yards. It backed slowly and the rear brakeman, acting as a pilot walked ahead around the curve. When he reached the street he discovered another train working on the track ahead and to avoid a collision, gave a stop signal to his own engineer which was communicated by the middle and forward brakeman and obeyed by the engineer who could not see the end of the train. When the train stopped, the end car

was on the street railway crossing and obstructed both tracks. Immediately after the stop the train moved towards the northeast and cleared the north street car track by fifteen or twenty feet. Then the train stopped and ran back slowly until its end again reached the north street car track and collided with a west-bound street car on which plaintiff was a passenger and which was attempting to pass over the crossing.

There was a flagman at this crossing who was hired by the Frisco Company but who was maintained at the equal charge of the Street Railway Company and three railroad companies, among them, the Rock Island. The motorman of the street car knew of the presence of the train, stopped at the crossing and waited until the train, moving northeastwardly, cleared the crossing and then proceeded over without looking again in the direction of the train. The train's pilot knew of the presence of the street car and observed it starting to cross as soon as the train left the crossing. The flagman knew of the presence of both train and street car and was on duty at his post. There is substantial evidence in the record accusing each and all of these men of negligence.

We shall content ourselves with giving only the following summary of the facts we find sustained by substantial evidence:

First. The flagman signalled the motorman to stop and remain where he was when his car was in a place of safety and the motorman disobeyed that signal in proceeding to cross.

Second. The flagman signalled the motorman to proceed and the motorman was following that signal when he ran his car into a place of danger.

Third. The return of the train to the crossing was caused by a signal from its pilot to back up.

Fourth. He gave no such signal, the engine did not move and the backward motion of the train was due to

recoil following the taking up of slack when the engine stopped.

Fifth. The motorman gave a warning signal on his gong of his purpose to cross and the signal was heard by both the flagman and the train pilot.

Sixth. The motorman started when the crossing was in range of the train's recoil.

Seventh. He did not start until the crossing was beyond the scope of such action and the train could not return to it without the action of the engine.

The petition contains the following general charge of negligence: "The defendants negligently caused or permitted a collision to occur between the said car of the Metropolitan Street Railway Company and a train of cars of the defendant Chicago, Rock Island and Pacific Railway Company which was running over the tracks and railroad of the St. Louis and San Francisco Railroad Company under a license, lease, permit or running arrangement."

Then plaintiffs allege "the negligence of the defendant Metropolitan Street Railway Company, concurring to produce said collision, was that it so negligently constructed, maintained and operated its car line or street railroad and the car on which said plaintiff, Belle J. Augustus, was a passenger that it negligently caused or permitted said collision."

"The negligence of the defendant, Chicago, Rock Island and Pacific Railway Company, concurring to produce said collision consisted in its negligently causing or permitting its said train or cars to come on and upon said crossing when it knew, or by the exercise of ordinary care should have known that such collision would be a natural and probable result thereof; and in negligently failing to warn said Metropolitan Street Railway Company of the approach of said train or cars and of the danger of a collision therefrom."

First, we shall determine the questions argued by the Street Railway Company and then consider those

argued by the Rock Island Company. Counsel for the Street Railway Company urge here the demurrer to the evidence overruled by the court. In the consideration of this demurrer, we must accept as proved the facts in evidence hostile to the contention of the defendant. From a merely evidentiary viewpoint it is difficult to conceive of a reasonable ground for excusing this defendant from liability for the injuries inflicted on plaintiff, its passenger, to whom it owed the duty of exercising the highest degree of care to protect her from injury during her transportation. It was the duty of the motorman to hold his car in a place of safety until the crossing was clear, i. e., until it was beyond action of the train resulting either from its recoil or the reversing of its engine. To run his car in immediately behind a slowly receding string of cars that could and might stop and return was not ordinary, much less extraordinary care. No signal from the flagman would warrant a prudent man in taking such chances and subjecting the lives of those intrusted to his care to such grave risks. If such signal, in fact, was given, it told the motorman nothing more about the train and its future action than his own senses had told him and he had no right to rely on the flagman's judgment in the face of the known facts that would disparage such judgment in the mind of a careful and prudent person in his situation. His duty commanded him to use his own senses and great caution for the protection of his passengers in a situation so fraught with dangerous possibilities and he could not cast that duty on the flagman and remain within the limits of proper care. More censurable still was his conduct if, as there is evidence tending to show, he started across in opposition to the flagman's warning. He had no right to take any chances and even if he thought the way was clear should have heeded a warning from one whose duty it was to give such warning and whose opportunity to detect the presence of danger was equal or superior to his own. The jury were

entitled to conclude that the motorman was negligent whether the signal he received was to proceed or remain stationary.

And, further, the flagman, so far as plaintiff was concerned, was the agent of this defendant and this defendant is answerable for his negligence. The jury were justified in believing from the evidence that he signalled the motorman to advance. If he did, the negligence of such act is too plain for serious discussion. It was his particular duty to know that the way was clear before giving such signal and the event demonstrated most convincingly his remissness in the performance of that duty. But counsel insist most earnestly that the petition charges this defendant with specific acts of negligence which are not supported by evidence. The answer we give to this argument disposes also of the principal objection urged against the instructions given at the request of plaintiff. The only specification of negligence is that the street railway company "so negligently constructed, maintained and operated its car line and the car on which said plaintiff was a passenger," etc. There is no claim in the evidence of any defect in the construction or equipment of the road and the negligence disclosed relates entirely to the operation of the car. The allegation is general and not specific. It does not point to any special act of negligence in the operation of the car, or, for that matter, in the construction of the road or in the maintenance of equipment. Under such averment the plaintiff might recover on any conceivable negligence of the company that could have caused the collision, and in this respect it differs essentially from the averment considered in *Hamilton v. Railway Company*, 114 Mo. App. 504, where specific acts of negligence were alleged.

Since only general negligence is charged, plaintiff was not required to adduce proof of specific negligence. She made out a *prima facie* case by proving she was a passenger and was injured by a collision of the vehicle

in which she was riding. The burden then shifted to the carrier of showing that the collision was not caused by its negligence but was due to unavoidable accident or to the negligence of others. [Goodloe v. Railway, 120 Mo. App. 194; Wills v. Railroad, 133 Mo. App. 625; Crews v. Railway, 19 Mo. App. 302; Kean v. Schoening, 103 Mo. App. 77; Magoffin v. Railway, 102 Mo. 540; Magrane v. Railway, 183 Mo. 119; Fullerton v. Fordyce, 144 Mo. 519.]

The effort in the argument of counsel of the Street Railway Company to make the specific averments of negligence on the part of its original co-defendants, the Rock Island and Frisco Companies perform the office of converting the averment of negligence on the part of the Street Railway Company from a general to a specific charge is unavailing. The dismissal of the last named defendant from the suit had the effect of eliminating from the petition the cause asserted against that defendant and we shall not consider the allegations relating to that abandoned cause as possessing any modifying effect on the remainder of the pleading.

As to the pleaded negligence of the Rock Island Company the charge that the brakeman failed to warn the operators of the street car of the approach of the train cannot be construed as a specification of negligence on the part of the motorman, since, with or without such warning, it was his duty to his passengers to know of the presence of the train and not to attempt to cross as long as it was in striking distance.

The demurrer of the Street Railway Company was properly overruled.

We have already sufficiently answered the criticisms of plaintiff's instructions urged by this defendant. A number of objections are leveled at the instructions given at the request of its co-defendant but those objections, even if valid, relate to errors of which plaintiff and the Street Railway Company might have complained had the verdict exonerated the Rock Island

Company. For instance, plaintiff, as we shall show, well might complain of an instruction authorizing the release of the railroad company on the ground that the collision resulted from the recoil of the train and not from a signal to back the train, but since the jury rejected that theory of the collision and held the Rock Island, in what way could the Street Railway Company have been prejudiced by a rejected hypothesis that was too favorable to its co-defendant?

We find the rulings on all the instructions are free from harmful error and pass to the questions relating to the liability of the Rock Island Company. *That* defendant owed plaintiff the duty of exercising ordinary care to guard against a collision at the crossing between its train and the car on which she was a passenger. In the exercise of such care it devolved on the Rock Island Company to take into consideration the fact that it was running its train over a busy street in rightful use by pedestrians and vehicles and not to approach the crossing without giving warning and not to do anything in the running of the train which unnecessarily would enhance the natural and inherent dangers and risks attending the switching of freight trains over a grade crossing. There was no apparent necessity for the stopping of the train at a place where the taking up of slack would clear the crossing and the reaction would cause the end car to return to the crossing and we say that theory of the collision urged as a defensive fact by counsel of the Rock Island does not tend to free their client from the imputation of negligence. The trainmen should have realized that persons using the street might be misled by the movement of the train away from the crossing into the supposition that it was being pulled away by the engine and would not return immediately. The fact that the movement was caused by the taking up of slack was peculiarly within the knowledge of the trainmen and in the exercise of rea-

sonable care, they should not have stopped at a place where the train would "kick" back and strike the unwary traveler who might be in its path. We held the motorman to knowledge of the dangers of the situation on the ground that in the exercise of the high degree of care a carrier owes its passengers, he should have thought of all the dangerous possibilities attending the act of running his car in behind a slowly receding train, but his failure to measure up to the standard of care imposed on him by law did not excuse the negligent invasion by this defendant of the rights of ordinary travelers on the street, (including the plaintiff), whose duty to themselves was only that of exercising ordinary care.

We find ample evidence to support the specific charges against this defendant. The averment that it negligently failed to warn the Street Railway Company of the approach of the train is sustained by evidence to the effect that the rear brakeman, who knew the cars would recoil to the crossing, gave no warning of that fact, but left the safety of the passengers who were in no position to protect themselves solely to the care of the motorman and flagman. Being in immediate control of the threatening instrumentality the active duty was on him to be on the lookout and to give warning of the presence of a peril of which he had every reason to believe people on the street would be ignorant.

The learned trial judge committed no error in refusing the request of this defendant for a peremptory instruction. Answering the numerous objections urged against the rulings on the instructions we find this defendant fared better in the instructions than the evidence warranted and has no cause of complaint.

We do not agree with counsel for the Street Railway Company that the verdict is excessive. The judgment is a clear expression and accomplishment of substantial justice and, as the cause was tried without

material error, it follows that the judgment should be affirmed.

It is so ordered. All concur.

A. M. CRAIG, Public Administrator, Appellant, v.
T. L. BRADLEY, Administrator, Appellant.

Kansas City Court of Appeals, January 30, 1911.

1. **ESTATES BY THE ENTIRETY: Personal Property: Married Woman's Statute.** Estates by the entirety exist in personal property in Missouri, unaffected by the statute giving the wife sole control and disposition of her property as though a *femme sole*. That statute did not interfere with or alter such estate.
2. ———: ———: **Note to Husband and Wife: Sale of Real Estate.** Where a husband and wife owned land by the entirety and sold it, taking a note for the purchase money, in the name of both, they have in it an estate by the entirety, and upon the death of the husband, she as survivor remained the owner of the whole note; and upon her death her administrator could recover it of his administrator.
3. ———: ———: **Bank Accounts.** Where two bank accounts, in different banks, opened by the husband and made up of deposits by him, were kept in the name of the husband and wife, the intention being that the survivor should have all, and he died; it was *held* that the accounts were estates by the entirety and upon the husband's death the wife remained the owner as survivor.
4. ———: ———: **Joint Note: Consideration from Two Persons.** Where a note was taken by husband and wife for borrowed money, a part of which was advanced by the wife for that purpose from her separate means, and the balance by the husband; it was *held* to be an estate by the entirety, and that the wife remained the full owner as survivor after the husband's death.

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5. **HUSBAND AND WIFE: Trustee: Wife's Act.** If the husband takes the wife's separate money, without her consent, in writing, as provided by statute, and invests it in notes or real estate, taking the deed or the notes in the name of both, he does not hold by an estate in the entirety, but will be considered as a trustee for the amount of her money. But this rule does not prevent the wife performing the transaction herself so as to create such an estate.

Appeal from Johnson Circuit Court.—*Hon. Samuel Davis, Judge.*

REVERSED AND REMANDED (*with directions*).

J. W. Suddath & Son for defendant appellant.

(1) Joint tenancies existed at common law in both real and personal property. *Johnston v. Johnston*, 173 Mo. 118. (2) Joint tenancies as to real property were abolished except as to husband and wife by the statute, unless expressly and specifically declared to be a joint tenancy by the conveyance or instrument creating it. R. S. 1899, sec. 4800; R. S. 1909, sec. 2878. (3) "The modern rule of equity is certainly to defeat a joint tenancy whenever it is possible." *Schooler, Personal Prop.*, sec. 156; *Johnston v. Johnston*, 173 Mo. 91, where the above is quoted with approval. (4) Tenancies by the entirety can only exist where there is a conveyance of a vested interest in the title of real property and did not exist in personal property at the common law. *In re Albrecht*, 136 N. Y. 91, 32 Am. St. Rep. 700; *Polk's Admr. v. Allen*, 19 Mo. 467; 1 *Cooley's Blackstone Com.*, Book 2 (3 Ed.), p. 432. (5) An estate by the entirety is not a joint tenancy but rests upon the unity of husband and wife and hence is destroyed by divorce. *Russell v. Russell*, 122 Mo. 235. (6) By the Married Woman's Act of the unity of husband and wife is abolished and they are left as to personal property on the same footing as to each other as any other persons. *Johnston v. Johnston*, 173 Mo. 91; *Armstrong v. Johnson*, 93 Mo. App. 493; *State ex rel.*

v. Brady, 53 Mo. App. 202. (7) Under the present statutes a husband and wife can own personalty jointly, and in the absence of proof to the contrary they will be taken to be the joint owners of all personalty standing in the name of both and entitled to equal shares therein in the case of the death of either. State ex rel. v. Brady, 53 Mo. App. 203. (8) Husband and wife are presumed to be joint owners in equal shares of a deposit in the bank; but evidence may show it is all his or all hers without the right of either to claim any part as the survivor on the death of the other. Armstrong v. Johnson, 93 Mo. App. 492; State ex rel. v. Brady, 53 Mo. App. 202; Denigan v. San Francisco, 127 Cal. 142, 78 Am. St. 35, 59 Pac. 390. (9) Where note is payable to husband and wife, it may be shown in what proportion they furnished the funds and they will be declared to hold in the proportion the funds they furnished bear to the whole and this is true in case of death of either. Johnston v. Johnston, 173 Mo. 91, and authorities under point 8. (10) If a husband take a note for his own debt in the name of both husband and wife, it takes delivery to make a gift, and mere assuming of ownership of the instrument by placing it, among his own effects, it would seem, is sufficient to counteract the presumption raised and show it his property. Daniels on Neg. Insts., sec. 257; Schouler's Domestic Relations, 119. (11) Or the devising of it in his last will, will defeat the presumption and show it is not a gift. Pile v. Pile, 74 Tenn. 508, 40 Am. Rep. 50.

M. D. Aber and O. L. Houts for plaintiff appellant.

(1) Under the common law and under the law in this state real property acquired by husband and wife, vests in them a tenancy by entirety and in the survivor the whole estate, and no express declaration of such intention is necessary. R. S. 1899, sec. 4600; R. S. 1909,

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sec. 2878; *Garner v. Jones*, 52 Mo. 68; *Russell v. Russell*, 122 Mo. 235; *Bains v. Bullock*, 129 Mo. 117; *Wilson v. Frost*, 186 Mo. 311; *Frost v. Frost*, 200 Mo. 474; *Holmes v. Kansas City*, 209 Mo. 513. The statute in this state intentionally emphasized the rule of the common law. *Russell v. Russell*, supra. It is said to be impossible by express words to convey land to husband and wife so as to make them tenants in common with each other. And courts that hold otherwise hold that an unmistakable intent to create a tenancy in common must be shown. *Russell v. Russell*, supra; *Wilson v. Frost*, supra. Married Women's Acts of 1875, 1883 and 1889 abolished the legal unity between husband and wife which gave rise to the estate by entirety; but the estate itself has not been abolished, but remains as at common law. *Bains v. Bullock*, supra. (2) Estates by entirety in husband and wife may be created in personal as well as in real property. All this property was vested in William E. Bradley and Julia A. Bradley, husband and wife, as an estate in entirety and inasmuch as she survived him it now belongs to her administrator. *Arn v. Arn*, 81 Mo. App. 133; *Wells, Admr., v. Moore*, 68 Mo. App. 499; *Shields v. Stillman*, 48 Mo. 82; *Johnson v. Johnson*, 173 Mo. 91; *Boland v. McKowen*, 189 Mass. 563, 76 N. E. 206.

ELLISON, J.—William E. Bradley and Julia A. Bradley were husband and wife, without children. They lived to an old age and died a few days apart, he on the 16th and she on the 29th of March, 1909. He left a will whereby he gave to Julia A. all of his personal property during her life. Defendant was appointed administrator of the estate. Upon Julia's death plaintiff, as public administrator, was put in charge of her estate, and he then brought this action to recover the following personal property claimed by defendant to belong to him as administrator of her deceased husband:

One note for \$3600 payable to William E. and Julia Bradley, endorsed, interest paid to July 7th, 1908, \$200 paid on principal.

One note for \$2500 payable to William E. Bradley and Julia A. Bradley or either of them, interest paid to January 4th, 1909, \$200 paid on principal.

Deposit in the Farmers and Commercial Bank in the name of William E. and Julia A. Bradley, \$309.36.

Deposit in the Bank of Holden in the name of William E. and Julia A. Bradley, \$181.10.

The action is based on the claim that the property thus held by these parties was an estate in the entirety and as such, upon the death of William, it became the sole property of Julia.

The evidence showed the note for \$3600 was given as purchase price of a tract of realty owned by William and Julia as an estate by the entirety. That the note for \$2500 was given to them for borrowed money and of that sum Julia contributed \$1083.75, which was drawn by her from the bank out of her *separate* account, the remainder, \$1416.25, was drawn by William by check on their joint account. The evidence further showed that the deposits which constituted the joint account were made by William and all checks on that account were drawn by him, with one exception when Julia drew \$25.

The trial court found that plaintiff was entitled to the note for \$3600, on the theory that besides being made payable to both, it was the proceeds of the sale of real estate held by entirety, and, as such, was the property of the surviving wife. The court further found that the note for \$2500 was not held in entirety, but that plaintiff was entitled to \$1083.75 of it on the ground that that was the sum Julia put in it. The court found for defendant as to the balance of that note, and also for both bank accounts. There were some other findings not necessary to notice, not being in dispute. Both parties appealed.

The defendant's complaint is that William owned one-half of the note for \$3600 and that, therefore, he should have had judgment for one-half, instead of plaintiff for all of it. Plaintiff's complaint is that the finding should have been in his favor for all of the note for \$2500, as well as all of the bank accounts, on the ground of an estate by the entirety in Julia, his intestate.

Defendant claims that while formerly there could be estates in entirety in personal property, such estates have been, in effect, abolished by the married woman's statutes which have been enacted in this state in recent years, which, in a property sense, disunite husband and wife. So that his full claim is that while the estate in entirety in lands has been preserved to husband and wife, such estate has been destroyed as to them in all personal property. The latter part of this claim is in direct conflict with the views of the Supreme Court. [Frost v. Frost, 200 Mo. 474; Bains v. Bullock, 129 Mo. 117.] In the latter case it was said that while the statute abolished the legal unity between husband and wife, which gave rise to estates by the entirety, it left the estate itself intact. In the former case it is said that the Married Woman's Statute did not have estates by entirety in view and did not intend any interference therewith, and that such estates had not been altered in any respect. And to the same effect, considering similar statutes, are the cases of Boland v. McRowen, 189 Mass. 563, and Pray v. Stebbins, 141 Mass. 219. Therefore estates by the entirety still existing as at common law, the case should be determined unaffected by the Married Woman's Statute.

The note for \$3600 was not only payable to William and Julia, which alone was sufficient, but it arose from the sale of lands held by them in entirety. Undoubtedly it was an estate in entirety, and the trial court properly ruled that upon his death the full title remained in her.

Both bank accounts were made up of deposits by the husband alone, in the name of both. Whether these were held in entirety depends upon the intention. The mere direction of the husband to the bank to keep the account in their joint names is not conclusive, but it has a favorable bearing on the question in the wife's favor. Thus, if a husband buys land with his own money and takes title in his wife, it will be presumed he intended it to be a provision for her. And the same is true where he causes a note to be taken in her name. [Case v. Espenschied, 169 Mo. 215.]

We consider that the evidence and circumstances surrounding these persons, in connection with the presumption just stated, leave no doubt that it was the intention of the husband, and indeed the wife's also, that the survivor was to have the whole of the accounts. The case of Platt v. Grubb, 41 Hun 447, is much like the one before us, and it was there held that upon the death of the husband the wife took the whole account as survivor.

We have given much consideration to the note for \$2500. We think it is not improper, ordinarily, in an estate of this kind to test one party's right by the right of the other. May we not say, by way of illustration, that a test of plaintiff's right, as representing the wife in the capacity of administrator of her estate, is the right the husband would have had in that note had he survived her? For the right to claim by reason of survivorship should be mutual; the right of each depends upon a corresponding right of the other; for, to be an estate by the entirety each must have an ownership in the whole of the estate. Therefore, if the husband could not rightly have claimed the whole of the note, had he survived his wife, she cannot claim it as his survivor. The ground stated as the reason why the husband could not have claimed it as an estate by the entirety, is that to allow such claim would be to annul the statute protecting the separate property

of married women, to which we have already referred. That statute is that in order that a husband may legally reduce his wife's personal property to his possession, she must give her express written consent. [Sec. 4340, R. S. 1899.]

But we think the husband made no effort to reduce to possession the wife's money which made up a part of that note. The facts show it to be a transaction of the wife's. She invested her money in the note in conjunction with her husband's money, and she, as well as he, had the note taken in the name of both so as to become an estate by the entirety. This, undoubtedly, she could legally do; for the statutory emancipation of married women, as regards their rights of property, enable them to deal with such property as though they were unmarried. Would the statute, therefore, have stood in the way of the husband's claim of an estate in the entirety had he survived the wife? Do not the facts disclosed in the record leave the statute without application? We do not intend to intimate a decision of a case not before us and only indulge in these suggestions by way of illustration.

But we conclude that, at least as to the wife's claim, which is here involved, the note was held as an estate by the entirety; and when William died, Julia remained the owner of the whole of it, and plaintiff, as her administrator, is now entitled to it.

There have been other grounds suggested to the effect that where the wife has advanced a part of the money for which a note is given to her and her husband, it is unjust to allow him the whole of it in case he outlives her. The same suggestion could, of course, be made were the positions of the parties reversed. Under the law, it seems there ought not to be given any weight to this suggestion. We cannot see how heed can be given to it without *destroying* estates by the entirety except in cases of devises or gifts. For if the considera-

tion given for the property is to be inquired into and each party is to get back the share he or she put in, there could not be an estate by the entirety. There are no words more antithetical than "share" and "entire." The law seems to be well settled that the fact of one of the parties advancing a part, or even all, of the consideration, will not prevent the estate arising therefrom being one in entirety. In *Shields v. Stillman*, 48 Mo. 82, and *Draper v. Jackson*, 16 Mass. 480, the consideration for which a note was given to husband and wife was rent for the wife's separate property; and in *Allen v. Tate*, 58 Miss. 585, the consideration came from the husband. These are cited because immediately at hand; but all the cases on the subject show that the fact of one party or the other advancing all, or a part of, the consideration out of which the estate arose, does not influence its effect as an estate in the entirety. [See also *Freeman on Cotenancy and Partition*, sec. 68.] In *Frost v. Frost*, 200 Mo. 474, 478, *et seq.*, no question was made that land belonged to husband and wife by estate in entirety without regard to how much of the funds of either went into the purchase money.

The only ground where it can be said that the wife, or her heirs, could reach the estate claimed to be held by the entirety, for the amount of her money that went into it, would be in the supposition spoken of above, where the husband used her money for the purchase without her consent in writing as provided by the statute to which we have already referred. But, as we have seen, no such case is presented.

It is insisted that the case of *Johnston v. Johnston*, 173 Mo. 91, stands in the way of the views above expressed. There are some statements in the opinion in that case which cannot be reconciled with the case of *Frost v. Frost*, *supra*, and in all points of difference we must follow the latter. That case refused to allow an estate by the entirety in favor of the surviving husband in a note taken by him in name of himself and

wife where the wife's money made up a part of the consideration, and allowed the claim of her heirs, to the amount of her money. That conclusion is based on a statement of facts showing that an estate by the entirety was not intended, but, on the contrary, the note and mortgage were taken to secure to each party the sums they respectively advanced. Passing by the process whereby such intention was ascertained *aliunde* the note and mortgage, and not considering whether the right existed to find out intentions outside the terms of the papers in the absence of fraud or mistake, yet it will be observed that Judge MARSHALL laid stress on the terms of the note itself (see pp. 103, 104, of the report). But regardless of how the intention of the parties was ascertained, the fact remains that in that case it was considered that the parties did not intend that an estate by entirety should be the result of the transaction; and the decision there rendered was influenced, if not altogether controlled, by that consideration.

It must, however, be admitted that the learned judge, in discussing the law of the case, shows that his view is that where either husband or wife advance unequal portions of the consideration for a note, or purchase money of land, an estate by the entirety will not be created, but each will be separately interested in the deed or note to the amount contributed. This, it is stated, results from a growing aversion, or unfriendliness, of the courts to such estates. In proof of this, extended reference is made to many well known and highly respected authors. But on reading these it will be seen that they are discussing estates in *joint tenancy* and *have no reference at all* to estates by the entirety. There is no question but the text writers and opinions of judges have shown a disposition to avoid giving effect to joint tenancies on account of the frequent injustice of survivorship, and when the parties advanced unequal portions of the consideration, they were held not to have intended a joint tenancy with survivorship.

In *Rigden v. Vallier*, 2 Ves. Sr., 252, 258, the lord chancellor stated that: "It has been said indeed, that if two men make a purchase, they may be understood to purchase a kind of chance between themselves, which of them shall survive; but it has been determined, that if two purchase, and one advances more of the purchase money than the other, there shall be no survivorship, though there are not the words *equally to be divided*, or to hold as *tenants in common*; which shows, how strongly the court has leaned against survivorship, and created a tenancy in common by construction on the intent of the parties." The same thing, in effect, was again said in the same case, in 3 Atk. 731, 734. And in *Patriche v. Powlet*, 2 Atk. 54, it was said that: "A joint tenancy is undoubtedly no favorite of a court of equity, though otherwise at law." These, and other similar cases, are the foundation for the statements made by the text writers quoted at length in *Johnston v. Johnston*, but it is shown by the cases and by the subject under discussion by the text writers, that they were only referring to *joint tenancies* and not *entireties*. The prejudice against joint tenancies came, in great part, out of the injustice of the survivorship which was the result of such a tenancy; such as where two strangers held such an estate and one of them died, his interest went to the other by survivorship and his own next of kin were cut out. But no one is justified in saying that an estate by the entirety is looked upon by the courts with this disfavor. And the statements quoted in *Johnston v. Johnston* from 4 Kent, 360, as being on the latter subject, are said, two pages further on, not to apply to estates by entirety. This reason for aversion to estates in joint tenancy could rarely apply to estates by the entirety, between husband and wife, since the next of kin to either are, generally, their children.

Besides, as we have already intimated; the two estates are so fundamentally different in so many respects, that what is said of one ought not to be applied

to the other. The statute in this state, in recognition of this injustice, has abolished joint tenancies, with their incident of survivorship, but it has not touched estates by entirety; on the contrary, out of over-caution, estates to husband and wife are excepted by that statute.

But the law was the same (so far as estates by the entirety are concerned) before that exception was added; for it had been held that the statute abolishing joint tenancies did not apply to estates by entirety. [Gibson v. Zimmerman, 12 Mo. 385.] And in Hall v. Stephens, 65 Mo. 670, it was said the statute in adding the exception of husband and wife, only enacted what was already the law without its aid, and so the same was said of a similar condition in New York. [Bertles v. Nunan, 92 N. Y. 152, 157.]

As already shown, the antipathy to joint tenancies grew out of the resulting incident of survivorship; but, correctly speaking, there is no survivorship in estates by the entirety. The surviving party only remains possessed of the title he had from the beginning. Owners of the estate by entirety take *per tout et non per mi*. [Gibson v. Zimmerman, 12 Mo. 385; Garner v. Jones, 52 Mo. 68; Bertles v. Nunan, 92 N. Y. 152; Stelz v. Shreck, 128 N. Y. 263; Barber v. Harris, 15 Wend. 615.]

The true nature of estates by the entirety and the distinction between them and joint tenancies, is pointed out by Judge VALLIANT in Frost v. Frost, *supra*, and the statement is made that the case of Johnston v. Johnston, *supra*, is regarded as of that class where a husband uses his wife's money to purchase land, taking the title to himself; that being a fraud against which the law will grant relief.

The judgment will be reversed and the cause remanded that judgment may be entered for the plaintiff. All concur.

**GINNOCHIO-JONES FRUIT CO., Respondent, v.
MISSOURI, KANSAS & TEXAS RAILWAY CO.,
Appellant.**

Kansas City Court of Appeals, February 13, 1911.

CARRIERS: Perishable Freight: Sale: Conversion. Wholesale dealers at Kansas City, Missouri, sold twelve boxes of apples to a retail dealer in Muskogee, Oklahoma, for \$38.40 and shipped them with a railway company, taking bills of lading in duplicate; one of these was sent to a bank in Muskogee with draft attached on the buyer for the purchase price, and both had noted thereon, in writing, to notify the purchaser at Muskogee. Notice was given and the purchaser refused the freight. The carrier then notified him if he did not take it away, it would sell. It was not taken and the carrier then sold for the best price obtainable. *Held*, that since by the law of Oklahoma a carrier of perishable freight, after giving notice of its arrival, may in the exercise of reasonable discretion, sell it without advertising, the carrier was not guilty of conversion.

**Appeal from Jackson Circuit Court.—Hon. Herman
Brumback, Judge.**

REVERSED AND REMANDED (*with directions*).

Lee W. Hagerman and Ellison A. Neel for appellant.

Stewart Taylor for respondent.

ELLISON, J.—This action was begun before a justice of the peace and is for the alleged conversion of a lot of apples, valued at \$38.40, shipped over defendant's road from Kansas City, Mo., to Muskogee, Oklahoma. The judgment in the trial court was for the plaintiff for that amount.

The ground of conversion stated in plaintiff's complaint is:

"That said defendant, after receiving said shipment, carried the same on its line of railroad to Muskogee, Oklahoma, and there, without the consent of the plaintiff as the shipper of said shipment, and without the production of the bill of lading, and without any order from the plaintiff, wrongfully converted the said shipment to its own use and disposed of and transferred the same to others, and the said shipment has been, by reason of such wrongful appropriation, wholly lost to the plaintiff."

It appeared in evidence that plaintiff is engaged in the wholesale fruit business in Kansas City, Missouri, and that one Christ Kooris is engaged in the sale of fruits by retail in Muskogee, Oklahoma, and that defendant's road runs between the two points. That Kooris ordered twelve boxes of apples from plaintiff, and the latter, after some delay, shipped them to him on the 23d of December, 1907, by delivery to defendant and taking a bill of lading, consigning the fruit to themselves, but containing the memorandum written therein: "Notify Christ Kooris." The fruit arrived in Muskogee on the afternoon of December 25th. A bill of lading with a draft on Kooris attached for the price, was sent by plaintiff to a bank in Muskogee. The next morning after arrival, defendant's agent notified Kooris, but he refused to take them. Again defendant notified him and again he refused to take them. Then on December 28th, the agent gave him this written notice: "You are hereby notified again that if the apples shipped to your order from Kansas City on December 23, 1907, are not removed by 12 noon today, same will be sold a-c perishable freight and to protect the interest of all concerned."

Kooris testified that he ordered the apples for the brisk trade which obtains just prior to Christmas, and as they arrived too late, he did not want them and would not take them.

The fruit not being taken, defendant's agent sold it late that afternoon for \$10.75. It had begun to rot and that was the best price obtainable. The agent testified that he had a great deal of trouble in disposing of them; that on account of being after the holiday season, buyers were very scarce and that he "made every possible effort to get their full value."

The statute of Oklahoma was introduced in evidence permitting the sale of perishable freight by the carrier when not taken by the consignee after notice of arrival. It reads as follows:

"Perishable property which has been transported to destination and the owner or consignee notified of its arrival, or being notified, refuses and neglects to receive the same, and pay the legal charges thereon, or if upon diligent inquiry the consignee cannot be found, such carrier may, in the exercise of reasonable discretion, sell the same at public or private sale without advertising, and the proceeds, after deducting the freight charges and expenses of sale, shall be paid to the owner or consignee upon demand."

It further appeared that plaintiff did not ship until the 23d of December. It further appears that the bank to which plaintiff sent the bill of lading with the draft on Kooris, was careless in acting for plaintiff. It was shown by the bank officers that they received the draft on December 26th, which signifies that either plaintiff delayed mailing it or it was delayed in the mail somewhere. It appeared in evidence given for plaintiff that the bank in Muskogee neglected to notify it of Kooris' refusal of the draft for nearly two weeks.

Taking the entire evidence it affords no support for the verdict and judgment. There were delays and refusal to take the freight, all acts of plaintiff and its agents, and for which defendant is in no way responsible. It was plaintiff's duty to have some one at Muskogee to receive the apples when they arrived. [Freeman & Hinson v. Ry. Co., 118 Mo. App. 526.] Plaintiff

had the right to designate to whom the freight should be delivered and defendant was bound to observe the direction. [Marshall v. Ry. Co., 176 Mo. 480, 491.] It did designate Kooris, by requiring that defendant notify him, and this it did repeatedly.

The case seems to us to be an effort to saddle the carelessness or refusal of plaintiff's own agents onto the unoffending defendant. The only question in the case is as to whether any liability was incurred by defendant in disposing of the apples, and that must be answered in the negative. The law of Oklahoma, already quoted, permits a carrier, after notice of the arrival of perishable freight, "in the exercise of a reasonable discretion" to sell it at public or private sale without advertising. The evidence is undisputed that every effort was made to sell it to advantage, and that \$10.75 was the best price obtainable, it being just after Christmas, when, as was shown, such articles were dull sale. There is no just ground to say that defendant did not comply with the law and act with reasonable discretion in making the sale. The freight charges were \$4.03 and the sale money was \$10.75, which leaves due plaintiff the sum of \$6.72. The judgment is reversed and the cause remanded with directions to enter judgment for that sum. All concur.

CHARLES M. MOSS et al., Respondents, v. MISSOURI, KANSAS & TEXAS RAILWAY CO., Appellant.

Kansas City Court of Appeals, February 13, 1911.

1. **CARRIERS: Loading Stock: Time of Trains.** Where a regular stock train was taken off by the carrier and an extra substituted without any time schedule, it was proper diligence in loading hogs for shipment by that train, to begin the loading when the time of arrival of the train was announced to the shipper by the carrier's agent.
2. ———: ———: ———: **Part of Shipment.** Where a carrier is notified by a shipper that he intends to ship three carloads of hogs to the market, and provides cars therefor, and the carrier's agent in charge of its train negligently delays moving the cars to the chute at the stock pens, and negligently takes the train out with only one of the cars of stock, and the others have to remain in the pens until next day, and by reason of the heat and confinement shrink in weight, the carrier is liable for the damage.
3. ———: ———: ———: **Evidence.** Under an allegation of diligence by the shipper and of negligence against the carrier, it was not error to allow evidence that it was neither proper nor usual to begin to load stock until the time the train would arrive was known; and that stock trains of defendant's road never left the station with only a part of the shipment.

Appeal from Vernon Circuit Court.—*Hon. B. G. Thurman*, Judge.

AFFIRMED.

Lee W. Hagerman for appellant.

Lee B. Ewing and *J. R. Moss* for respondent.

ELLISON, J.—Plaintiff's action is to recover of defendant for its failure to transport two carloads of hogs from the town of Walker, Missouri, to St. Louis,

whereby they shrunk in weight to his damage in the sum of \$108.22. The judgment in the trial court was for the plaintiffs.

The evidence in plaintiffs' behalf tended to prove that they desired to ship, on June 7, 1909, three carloads of hogs over defendant's road to the market in St. Louis. That a day or two before that date they notified defendant's agent at Walker and in compliance with this request defendant set out three empty cars on a siding leading by its stock pens, and left one of the cars at the chute. Defendant's regular stock train was due at Walker at 10:30 o'clock in the morning, but on the morning of the 7th of June (perhaps before) it was taken off and a special train, without regular schedule, was put in its place. There was no way to know when this train would arrive except through the agent at Walker, and neither he nor plaintiffs was notified of its coming until between twenty and thirty minutes before its arrival. As soon as informed, plaintiffs began to load the car at the chute and could get but that car loaded before the arrival of the train. When the train got in, the conductor saw the situation and instead of moving the loaded car out and putting an empty one at the chute, he went to the station house for orders, the engine remaining idle during this time. He returned and ordered the loaded car to be taken out and an empty put in its place for loading. This was done, and plaintiffs got the second car loaded before the train left; but instead of putting this car in its train, with the first, the train left without taking it, or waiting for the third to be loaded. It was further shown that, in consequence of this, it became necessary for plaintiffs to unload the loaded car into the pens, with the hogs intended for the third car, where the two loads were kept in the heat until the next day; the shrinkage complained of resulting. There was evidence in defendant's behalf in many respects differing from that of plaintiffs', but

as the verdict was for the latter we accept as the facts in the case what their evidence tends to prove.

In showing the stock to be partly loaded in the car and the remainder in defendant's stock pens, there was undoubtedly a delivery to defendant for shipment. [Lackland v. Ry. Co., 101 Mo. App. 420; Mason v. Ry. Co., 25 Mo. App. 473.] "Where cattle have been placed in company's pens for immediate shipment, and part of them have actually been loaded on the cars, the cattle are in the custody of the company as a carrier, and not as a warehouseman." [4 Elliott on Railroads, 2183.]

In accepting the evidence in plaintiff's behalf we are led to an affirmance of the judgment. The instructions presented the issue whether plaintiffs began to load the hogs as soon as told of the time the train was expected. Defendant asked but one and that was given. It informed the jury that if plaintiffs had been notified when the train would arrive, in time to have the cars loaded, and did not get them loaded, defendant was under no duty or obligation to wait for the loading thus neglected.

Some objection is made to the sufficiency of plaintiffs' petition on the ground that it does not state a cause of action. This is said to be for the reason that it states wantonness and negligence and that these are contradictory. We have examined the pleading in this respect and have no doubt that it sufficiently states a cause of action for negligence.

Nor do we regard the objection to witnesses stating that when a part of a shipment was loaded and other parts in process of loading, the defendant company had never before taken the train out without getting the whole shipment. It was objected to on the ground that a custom was not pleaded. We think it was not the purpose to establish a custom as that word may be technically understood, but rather as a persuasive mode of establishing the act in this instance, as negligent. We

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think the evidence, in the circumstances, was within the issue. All of the evidence in this branch of the case, including that of the time when plaintiff's began to load, was a proper way to show diligence on plaintiff's part and negligence on the part of defendant.

We are satisfied from the entire record that no substantial error was committed and that the judgment was for the right party. It is accordingly affirmed. All concur.

GEORGE R. KIMBLE, Respondent, v. MAUD R. McDERMOTT et al., Appellants.

Kansas City Court of Appeals, February 13, 1911.

LANDLORD AND TENANT: Trespass: Forcible Entry. Where a landlord enters the premises against the objection of the tenant, with the intention to cut and haul away some hay in which he had a share, and goes into the meadow on two or three succeeding days for that purpose and cuts and hauls the hay away, he commits a trespass but is not guilty of forcible entry and detainer.

Appeal from Bates Circuit Court.—*Hon. C. A. Denton*, Judge.

REVERSED.

Thomas J. Smith for appellant.

J. S. Brierly, Charles W. Sloan and D. C. Chastain for respondent.

ELLISON, J.—This is an action of forcible entry and detainer. It was brought in Cass county before a justice of the peace and was removed to the circuit court by certiorari. A change of venue was granted and the cause sent to Bates county, where it was tried and a judgment given for plaintiff.

It appears that the defendants, McDermotts, are husband and wife and defendant Keith is employed by them as a farm hand. That Mrs. McDermott is the owner of farm lands in Cass county which she leased in writing to plaintiff from March, 1909, till February, 1910. That twenty-three acres of the land was timothy and clover meadow, and it is that part of the premises which is in controversy. It was provided in the lease that plaintiff was "to cut the first crop of hay in proper season and properly care for same and shall deliver in alternate loads direct from the field the one-half of same by weight to said McDermott in barn on her premises as directed."

It appears that Mrs. McDermott (who lived near by), noticing that the meadow was not being cut at the time she thought it ought to be, gave plaintiff notice on the 20th of June that he should cut it. She notified him again on the 25th of that month. It seems that plaintiff had begun cutting the grass but was slow about it. In a day or two Mr. McDermott (acting for his wife) told the plaintiff that if he did not finish cutting at once he would go into the field and cut the hay himself. Then, on the first or second day of July, he and Keith as his employee went in the field and cut that part of the hay not cut by plaintiff. Plaintiff was in the field cutting at the same time and protested and objected to McDermott's cutting. They gathered up what each had cut and hauled it away. There was no interference with plaintiff or collision between the parties. Each of them proceeded about the work without any trouble save the objection made. McDermott cut Saturday and hauled away Monday, may not have taken it all until next day; and that was the extent of the acts which are claimed to constitute a forcible entry and detainer. This action was begun before McDermott got the hay off of the premises.

The statute (secs. 7655, 7656, R. S. 1909) provides that if any person shall forcibly enter upon the lands

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of another "and detain and hold the same," he shall be guilty of forcible entry and detainer. It is manifest that there was no intention to take and detain the possession of the premises. Whatever wrong defendants may have committed was merely a trespass. [Rouse v. Dean, 9 Mo. 301; Bell v. Cowan, 34 Mo. 251; Powell v. Davis, 54 Mo. 315.]

The judgment is reversed. All concur.

JOHN DAVIS et al., Respondents, v. SAMUEL GROSS
et al., Appellants.

Kansas City Court of Appeals, January 30, 1911.

REAL ESTATE AGENT: Purchase at Partition Sale: Bids: Public Policy. G. and his wife desired to invest in Kansas City property and engaged a real estate agent to look for a satisfactory purchase, the seller to pay the commission. Property was found, but it was ascertained that it was to be sold at partition sale where the seller could not pay commission. It was then agreed that the agent would not look for other purchasers of the property and that he would notify G. and his wife when and where the sale would take place and would attend the sale and assist them; it being agreed that G. and wife would pay the ordinary commission on sales of such property. The agent performed the service agreed and G. and wife purchased the property at the sale. It was *held* that the agent could maintain an action for the commission. And that the agreement not to look for other purchasers at the sale was not fraudulent or void as against public policy.

Appeal from Jackson Circuit Court.—*Hon. Thomas J. Seehorn*, Judge.

AFFIRMED.

James M. Chaney and *Hal R. Lcbrecht* for appellant.

Joseph A. Guthrie and *George S. Bryant, Jr.*, for respondent.

ELLISON, J.—Plaintiffs are real estate agents and brought this action for commission on the purchase of real estate in Kansas City. They recovered judgment in the circuit court.

The petition alleged that defendants desired to invest in property and that plaintiff Davis was looking for a suitable purchase. That he discovered the Brevoort Hotel could be had by purchase at a partition sale and notified defendants. That it was agreed that plaintiffs should advise them of the time and place of sale, and if it was bid in by defendants they would pay plaintiffs the customary commission.

Since the verdict was for plaintiffs, we will assume the facts to be as the evidence in their behalf tends to prove them. It appears that defendants wanted to invest in some real estate in Kansas City and plaintiff Davis was looking for property that would suit them. In July or August, 1908, he saw an advertisement of property known as the Brevoort Hotel, by his co-plaintiff Rowland, who was a real estate agent. He called on the latter and obtained a price of \$13,000 which he placed before defendants. It suited the latter and they said they would buy. Up to this time it was not understood that defendants were to pay any commission on the sale, it being the custom for sellers to settle for commissions to agents procuring the sale. But it became known that the title to this property was in three parties, and that it was then the subject of a partition suit in the Jackson County Circuit Court and was to be sold at a partition sale in the following October. Plaintiffs informed defendants of this situation and also stated to them that that being the condition, no commission could be paid by the seller, and, if defendants purchased, they must pay a commission to them. Plaintiffs stated that they would not look out or seek for other purchasers and would notify defendants of the day of sale and take them to the sale, and, as expressed by one of the witnesses, "Mr. Gross and Mr. Rowland

was to bid in the property." Defendants agreed to pay a commission. Plaintiff Davis and defendants went to plaintiff Rowland's office and agreed to pay a commission on whatever price the land sold for at the partition sale. Plaintiffs notified defendants of the sale; but a day or two before it was to take place, they informed plaintiffs that they would not attend the sale and would not buy. They returned the abstract plaintiffs furnished them. Plaintiffs protested that in view of their agreement to buy, they (plaintiffs) had not sought other purchasers, etc. Plaintiffs felt that all was not right, and Rowland said he would go by for them on the day of the sale, at least, perform his part of the contract. He did go by and learned from Mr. Gross that his wife had gone to the court house, the latter telling him "to be there." He went to the court house, met Mrs. Gross, and introduced her to the commissioner and others interested in the sale. Something was again said about the commission and no objection from her. She suggested that Rowland do the bidding, when he said it would be better that she do it, which she did. She got the property for \$12,675.

The terms of the sale were that \$4000 was to be paid in cash, and during the bidding Rowland inquired of a bidder if he was prepared to put up that amount in cash and found that he only proposed to pay \$1000. Believing this to be unfair competition, he raised the question of the propriety of this man bidding and he was ruled out.

We consider that the evidence given in behalf of plaintiffs amply supports the verdict. In our opinion the testimony of Mrs. Gross herself is sufficient to sustain it. She admits that she knew plaintiffs were expecting a commission from her and with that knowledge she attended the sale with Rowland and asked him to bid for her. She admitted, before the sale, when informed

by plaintiffs that they must pay a commission she remained silent.

The objection to the testimony of Rowland that he was instrumental in stopping the bidding from the man who could not comply with the terms of the sale, was not well taken. It was certainly unfair to defendants that a bidder who, confessedly, would not comply with the terms of the sale, should compete with them. And it was valuable service to defendants for Rowland to stop him. It was but a part of his duty as a representative of defendants, and its tendency, happening as it did, in the presence of Mrs. Gross, was to show his agency and performance of service as declared upon in the petition.

The objection to evidence that plaintiffs would not have any other bidders at the sale than defendants, was not well taken. It was merely an agreement to consider defendants as the prospective buyers and that they would represent them and not look out for others. It was only a statement of what good faith to defendants required. We can see nothing improper in it. But it is said that this objection and the one as to the disqualified bidder, were not within the contract stated in the petition, and *McMillen v. City of Columbia*, 122 Mo. App. 34, is cited. We do not see that the case has any application. It was well remarked by the trial court that plaintiffs were not required to plead their evidence.

We have given careful consideration to the extended argument in defendants' favor but, in view of the finding of facts, cannot allow it sufficient force under the law, to overturn the judgment.

The instructions sufficiently submitted the issues, and we can do nothing less than affirm the judgment. All concur.

STATE OF MISSOURI, Respondent v. E. H. CHINN,
Appellant.

Kansas City Court of Appeals, January 30, 1911.

1. **INTOXICATING LIQUORS: Prescription: Date.** A prescription, to authorize a druggist to sell intoxicating liquor, must be dated, and a date in these words is sufficient: "Rocheport, Missouri. Date June 21-9," under a charge for selling on that day in the year 1909.
2. ———: ———: **Substantial Compliance.** Where the statute requires a prescription to authorize a sale of intoxicating liquor and that such prescription shall state that it is prescribed as a necessary remedy, a prescription reading: "Whiskey as a necessary remedy," is sufficient. The omission of the words "prescribed as," will not invalidate it.
3. ———: ———: **Signing Prescription: Knowledge.** It is not necessary that a purchaser of liquor of a druggist under a prescription, should see the physician sign it or know that it was signed. If signed before, or at time of sale, it is sufficient. Whether any one saw it signed is of no consequence.
4. ———: **Instructions: Comment.** Instructions commenting on the evidence and directing special attention to certain parts, are erroneous. And an instruction submitting a hypothesis of which there is no evidence, is improper.

Appeal from Boone Circuit Court.—*Hon. N. D. Thurmond*, Judge.

REVERSED AND REMANDED.

F. G. Harris and *W. H. Rothwell* for appellant.

L. T. Searcy and *H. D. Murray* for respondent.

ELLISON, J.—The defendant is a druggist and was convicted for selling intoxicating liquor in less quantities than four gallons, to James Stewart, without a prescription, in violation of the local option statute.

It appears that defendant is not only a druggist, but a physician as well. The only evidence worthy of consideration relates to two sales to Stewart, one on June 21, 1909, and the other a week thereafter, on June 28th, and it was upon these sales the case was tried in the circuit court. The accused admitted both these sales and relied in defense upon a prescription for each. Two objections are made to the prescriptions, one that they are not dated, and the other that they do not state the liquor to be prescribed as a necessary remedy. The statute (sec. 3047, R. S. 1899; sec. 5781, R. S. 1909) forbids a sale "except on a written prescription, dated and signed, first had and obtained from some regularly registered and practicing physician, and then only when such physician shall state in such prescription the name of the person for whom the same is prescribed, and that such intoxicating liquor is prescribed as a necessary remedy." The objection as to date is met by the prescriptions themselves in these words and figures: "Rocheport, Missouri. Date June 21- 9." The figure "9" is used evidently as an abbreviation of the full figures "1909", and we think is sufficient.

The other objections relates to the following: "a necessary remedy;" the supposed defect is that the words "prescribed as" are omitted. We think such defect not of sufficient substance to destroy the paper as a prescription. Undoubtedly it would sustain a prosecution under section 5783 and 5784 for a false or fraudulent prescription not given in good faith. The trial court admitted them in evidence, and under the cases of State v. Nixdorf, 46 Mo. App. 494, and State v. Hammack, 93 Mo. App. 521, was fully justified in doing so.

Instructions for the state contained harmful error. One stated that if the prescriptions were signed without the knowledge of Stewart, they were no defense. If signed before the sale, it is not necessary that the purchaser saw the signing or knew that they were signed.

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Another submitted to the jury as an issue, whether the prescription of June 21st had been prepared and filed after the sale. There was no evidence upon which to base it, and, properly it had no place in the case.

Another part of the same instruction selected certain parts of the evidence, by special reference thereto, and submitted it to the attention of the jury. And another part directed the attention of the jury to a certain witness and to what he stated. The result of these things, was special comment as well as argumentative; things forbidden by the law.

The judgment is reversed and the cause remanded. All concur.

MARY A. ZEILER, Respondent v. METROPOLITAN
STREET RAILWAY COMPANY, Appellant.

Kansas City Court of Appeals, February 13, 1911.

1. **CARRIER OF PASSENGERS: Appellate Practice: Evidence.** In an action by a passenger against a common carrier to recover damages for personal injuries caused by the negligence of the carrier in suddenly starting the car while the passenger was alighting therefrom, the appellate court will not disregard the testimony of three witnesses that the car did start while plaintiff was alighting, ran from two to four feet, and then stopped, on the ground, as contended by appellant, that this testimony can not be reconciled with the physical facts of the case, and that therefore defendant's request for a peremptory instruction should have been granted.
2. ———: **Jury Question.** The question whether it was physically impossible for the car to have been started by the motorman with enough violence to cause plaintiff to lose her balance, and yet for the car to have been stopped in two or three feet, was for the jury, and the court did not err in overruling defendant's demurrer to the evidence.
3. ———: **Instructions.** It was not error for the plaintiff's instruction to inform the jury of the nature of the legal relations between carrier and passenger, *i. e.*, that it was the duty of the

operators of the car not to start it, until plaintiff had stepped in safety to the pavement, when such information was pertinent to one of the contested issues of fact in the case.

4. ———: ———: Where the gravamen of the action was the negligence of defendant's servants in allowing a car under their control to start prematurely, an objection is hypercritical on the ground that the instructions broadened the scope of the cause pleaded in authorizing a verdict on finding that defendant "caused or permitted said car to be moved," while the petition alleged that defendant "caused *and* permitted."

Appeal from Jackson Circuit Court.—*Hon James H. Slover*, Judge.

AFFIRMED CONDITIONALLY.

John H. Lucas for appellant.

Scarritt, Scarritt & Jones for respondent.

JOHNSON, J.—This is an action by a passenger against a common carrier to recover damages for personal injuries caused by the negligence of the carrier in suddenly starting the car in which the passenger was riding, while she was alighting therefrom. A trial to a jury resulted in a verdict and judgment for plaintiff for five thousand dollars and the cause is before us on the appeal of defendant.

The injury occurred June 8, 1908, on Main street in Kansas City at either Eighteenth or Nineteenth streets. The evidence of plaintiff does not fix the place with certainty while that of defendant shows that the car was at Eighteenth street at a regular stopping place for the reception and discharge of passengers. The car was north-bound and stopped to let off passengers, among them plaintiff and her two companions who desired to transfer to a car on another line of defendant. The conductor watched the three women leave the car and states that it was stationary the whole time; that he gave no signal to start while they were alighting, that

the car did not start and that plaintiff in stepping off accidentally tripped or stumbled and pitched forward to the pavement. His statement is supported by the testimony of numerous witnesses.

On the other hand, the testimony of plaintiff and her witnesses tends to prove the following facts: When plaintiff, who was sixty years old and weighed 270 pounds, and her two companions started to leave the car it had stopped in response to their signal and remained stationary until plaintiff was going down the steps at the entrance to the rear vestibule, when it gave a violent lurch forward and threw her to the pavement, face downward. She screamed as she fell and the car stopped after running not more than three or four feet. Plaintiff was preceded by one of her companions and followed by the other. The one in front alighted in safety and started to the sidewalk when she was arrested by plaintiff's outcry. She did not see the car move but observed plaintiff lying prone some distance rearward of the car. The woman following plaintiff testified:

"Q. What was the car doing at that time? A. When we got off the car had stopped and Mrs. Fitch got off and went on across the street, and Mrs. Zeiler got off to get down on the first step—in the vestibule, you know, and the car gave an awful lurch—

"Q. And what happened to Mrs. Zeiler? A. It threw her off.

"Q. In which direction from the car? A. It threw her south at the back end of the car.

"Q. The car was going north? A. The car was going north.

"Q. Where were you at that time? A. I was standing in the door, and I should have fallen if I hadn't been holding on to the side of the door, the car gave such a lurch.

"Q. After Mrs. Zeiler was thrown, as you describe, what did you do? A. I got off as quick as I could.

"Q. Did the car stop again? A. The car stopped before I got off, when it gave this lurch.

"Q. Where was Mrs. Zeiler then? A. She was lying at the south end of the car.

"Q. Just tell the jury where she was in reference to the car? A. Well, she was lying out from the car at the back of the car, and I suppose three or four feet from the car, because I got off and went around her—and she fell face foremost—just spreading right out."

Another of plaintiff's witnesses—a passenger on the car—testified:

"Well the car stopped—the car was very crowded—the rear portion of it, to the rear platform was crowded, and they were standing around even into the doorway. These ladies started to get off, and as I thought, they had gotten off, because there was so much of a crowd I couldn't see the steps at all. I was sitting up on this side, on a seat nearer to the front door, and a signal was given to go ahead—in other words, two bells—and the car started, and I heard a scream. I made for the front door and I stepped down on the step—there were three steps to this car, and the car was just stopping—I went around the front end and found Mrs. Zeiler, the lady in question, lying behind the car.

"Q. How far back of the car, when you got back there, did you find her lying? A. Oh, two or three feet.

"Q. Was that car moving at the time you got up and rushed out? A. Yes sir.

"Q. And it started up just before this scream occurred? A. Yes, sir."

He further stated that after suddenly starting, the car moved four or five feet.

Plaintiff states that as she started down the steps she grasped the handhold at the rear of the vestibule with her right hand and held on until the force of her fall caused her to let go.

The petition alleges "but defendant, disregarding its duty to plaintiff as its passenger, by and through its servants and agents upon and in charge of and managing its said car, carelessly failed and neglected to cause said car to remain stopped a reasonably sufficient length of time for plaintiff to alight therefrom in safety, but carelessly and negligently permitted and caused said car to be moved and started forward suddenly and with a jerk, while plaintiff as such passenger was in the act of alighting from said car, and without any warning thereof to plaintiff, and when defendant's servants and agents upon and in charge of and managing said car saw, or by the exercise of ordinary care might have seen, the situation of the plaintiff while in the act of alighting from said car, in time by the exercise of due care to have so managed said car as to have avoided any injury to plaintiff."

At the request of plaintiff the court gave the following instructions:

"The court instructs the jury that defendant and its employees in charge of the car on which plaintiff was a passenger, at the time in question, owed plaintiff the duty to operate said car, at the time and place in question, with the highest practical degree of care that a very prudent person engaged in a like business would exercise under the same or similar circumstances to those disclosed by the evidence in this case.

"The court instructs the jury that if you believe from the evidence the defendant on or about June 8, 1908, was conducting and operating a street railroad and cars thereon in Kansas City, Missouri, on which it carried passengers for hire, and that on or about said date, plaintiff became a passenger upon one of defendant's cars, the motive power of which was electricity, and paid her fare to be carried as a passenger thereon, and that when said car upon which she was a passenger as aforesaid arrived at Main street at a usual stopping place for letting passengers off at or near

Eighteenth street or Nineteenth street, in Kansas City, Missouri, it was stopped for the purpose of letting passengers off said car, and that upon the stopping of said car as aforesaid plaintiff proceeded to alight therefrom, and that while she was in the act of so alighting the defendant, acting by and through its servants and agents in charge of said car, carelessly and negligently, and without allowing plaintiff a reasonable time to get off said car, caused or permitted said car to be moved and started forward suddenly and with a jerk, whereby plaintiff was thrown from said car to the street pavement and her leg, knee and body thereby injured, then your verdict should be for the plaintiff.”

Counsel for defendant insist that their request for a peremptory instruction should have been granted. They argue that the record is barren of any substantial evidence in support of the averment that the car suddenly started. Three witnesses say it did start while plaintiff was alighting, ran from two to four feet and then stopped, but we are asked to disregard this testimony on the ground that it cannot be reconciled with the plain physical facts of the case. We perceive nothing improbable in the evidence. The nature and direction of plaintiff's fall as described by her witnesses indicate that while she was alighting in the awkward manner characteristic of women, i. e., stepping straight out and using her right hand for support, instead of facing towards the front and grasping the handle with her left hand, her feet were jerked forward by a sudden lurch of the car and her body was pitched towards the opposite direction. Doubtless the nature and duration of her grip on the handhold had some influence on the direction of her fall. We think under all the facts and circumstances disclosed the inference is reasonable that she was thrown by a sudden forward movement of the car.

Counsel contend that had the car been started by the motorman with enough violence to cause plaintiff

to lose her balance it could not have been stopped in two or three feet. We regard this as an argument exclusively for the consideration of the triers of fact. We shall not declare as a matter of law that the movement in question was physically impossible. The conclusion is reasonable that the motorman, at the instant he turned on the power realized he was acting prematurely and immediately reversed the lever and stopped the car. Such spasmodic starts and stops of electric street cars occur often enough to be of common knowledge to patrons of such conveyances. The question of whether the injury occurred in the manner alleged or in the way claimed by defendant was an issue of fact for the jury. The court did not err in overruling the demurrer to the evidence.

Objections are urged against the instructions given at the request of plaintiff, but we find them free from prejudicial error. Street railway companies, being common carriers, owe their passengers the duty of exercising the highest degree of care to carry them in safety. This duty continues while the passenger, himself in the exercise of reasonable care, is alighting at a place where the car is stopped for the purpose of permitting him to alight. It was the duty of the operators of the car not to start it until plaintiff had stepped in safety to the pavement. [Nelson v. Railroad, 113 Mo. App. 702.] It was not error for the instruction to inform the jury of the nature of the legal relation between carrier and passenger when such information was pertinent to one of the contested issues of fact in the case.

We consider hypercritical the objection that the instructions broadened the scope of the cause pleaded in authorizing a verdict on the finding that defendant "caused *or* permitted said car to be moved and started forward," etc., while the petition alleges that defendant "caused *and* permitted," etc. The gravamen of the action was the negligence of defendant's servants in allowing a car under their control to start prematurely

when, had they exercised proper care, it would not have started. The jury, to find for plaintiff, were required to believe that the car started through the negligent agency of the motorman or conductor and the averment is comprehensive enough to include any act of that nature.

Finally, defendant contends that the verdict was excessive. The injury to plaintiff was severe, excruciatingly painful, and resulted in permanent injury to her left leg that will partially cripple her for life. We think five thousand dollars for a permanently and completely crippled leg is not unreasonable, but we are satisfied the verdict is excessive since plaintiff is not completely crippled.

If, within ten days plaintiff will enter a remittitur of one thousand dollars, the judgment will be affirmed without cost. Otherwise it will be reversed and the cause remanded. All concur.

ROBERT G. SHEETS and SAMUEL S. DAY, Respondents, v. THE IOWA STATE INSURANCE COMPANY, Appellant.

Kansas City Court of Appeals, February 13, 1911.

1. **APPELLATE PRACTICE: Instructions: Necessity of Objections.** Where the defendant failed to object at the trial to any of the instructions given at the request of the plaintiff, the rule "that before one can legally except to the action of the court in giving or refusing instructions, he must first request the court to give the same or object thereto, as the case may be, before his exceptions will be availing," applies not only to instructions involving constitutional questions, but is applicable to all given instructions. Hence, assignments of error by defendant relating to such instructions of plaintiff, are not before the appellate court.

2. **FIRE INSURANCE: Agency: General Distinguished from Special Agent.** In the agency contract, defendant fire insurance company curtailed the authority of its agent to that of a mere solicitor of insurance who was only to be intrusted with the receipt of applications for insurance, and premiums therefor. The policy, on its face, however, contemplated that a sale of the property might be made while the insurance was in force. There were no provisions in the policy that the endorsement of the company must be made by any particular officer. In addition to taking the applications for policies, and collecting premiums, the agent countersigned all policies issued through his office and delivered them. *Held*, that the agency of defendant's solicitor was general rather than special in view of the provisions of section 7995, R. S. 1899 (section 7047, R. S. 1909) that "foreign companies admitted to do business in this state shall make contracts of insurance only by lawfully constituted and resident agents, who shall countersign all policies so issued."
3. ———: **Statutes: Construction of Section 7047, R. S. 1909.** One of the main purposes of section 7795, R. S. 1899 (section 7047, R. S. 1909) was to put a stop to the irritating and unjust practice indulged in by some insurers of adroitly phrasing their agency contracts in a way to bestow general powers upon their agents when such powers relate to the benefits flowing to the company, and to invest such agents with no power to represent the company when the benefits of the insured are involved.
4. ———: ———: ———: Under the provisions of section 7995, R. S. 1899, (section 7047, R. S. 1909) countersigning resident agents of foreign fire insurance companies are presumed to possess authority to make contracts of insurance for the principals, and defendant is estopped from disputing such authority.
5. ———: **Increase of Insurance: No Forfeiture.** Where additional fire insurance was taken out with the knowledge and consent of the local agent of the defendant, a foreign insurance company, and such additional insurance did not increase the total insurance beyond the limit fixed by the "rider" attached to the policy, the proposition that the increase of the insurance was in direct violation of the contract, and that the forfeiture of the policy was the penalty imposed, must be ruled against defendant.
6. ———: **Alienation Clause: Sale in Course of Business.** A sale in bulk of goods worth \$400 out of a stock valued at \$9000 was a sale made in the course of business from stocks of merchandise to which the alienation clause of a fire insurance policy was not intended to apply, because such a sale would not materially enhance the risk.

Appeal from Grundy Circuit Court.—*Hon. P. C. Stepp,*
Judge.

AFFIRMED.

Hall & Hall, James C. Davis and Hughes & Sawyer
for appellant.

A. G. Knight, E. R. Sheetz and E. M. Harber for re-
spondents.

JOHNSON, J.—This is an action on a policy of fire insurance. The trial resulted in a judgment for plaintiff for the full amount of the policy with interest and costs and an appeal to this court was allowed defendant. We transferred the cause to the Supreme Court on the ground that a constitutional question was in the case but that court held that the question “was not timely raised below and for that reason cannot be properly considered on appeal” and sent the case back. [Sheets v. Insurance Co.. 226 Mo. 613.]

Counsel for defendant have sixteen specifications of error in their brief, thirteen of which refer to instructions given by the court at the request of plaintiffs. One of these instructions, numbered 3, was attacked in the motion for a new trial on the ground that the statute on which it was based (section 7995, R. S. 1899) is unconstitutional. That was the constitutional question which prompted us to transfer the cause to the Supreme Court and which that court held was not raised in proper time since first it appeared in the motion for a new trial. The rule was iterated in the opinion that “in so grave a matter as a constitutional question it should be lodged in the case at the earliest moment that good pleading and orderly procedure will admit under the circumstances of the given case, otherwise it will be waived,” and it was held that defendant

should have raised the question at the time the instruction founded on the statute was offered. The fact is noted that the record fails to show any objection to the instruction and the rule is pronounced "that before one can legally except to the action of the court in giving or refusing instructions, he must first request the court to give same or object thereto, as the case may be, before his exceptions will be availing."

In *Welch v. Coal Co.*, 132 S. W. Rep. 49, we held this rule applicable to all given instructions and rejected the view that it was intended to apply only to instructions involving constitutional questions. Such also is the conclusion of the St. Louis Court of Appeals. [*Stevens v. Maccabees*, 132 S. W. 757.] We perceive no reason for changing our opinion and, since the record before us does not show that defendant objected to any of the instructions given at the request of plaintiff, we hold that the assignments of error relating to such instructions are not before us and shall confine our attention to the remaining assignments discussed in the briefs. Two of them are based on the refusal of the court to give the jury a peremptory instruction to find for defendant and the other relates to rulings on evidence.

The material facts of the case thus may be stated: Defendant is a foreign insurance company and has its chief office in Keokuk, Iowa. It is licensed to do business in this state and maintains an agency at Cainsville, Missouri. In September, 1904, it issued a policy for \$2000 to Adams & Son of Cainsville on a stock of merchandise owned by that firm. The agent of defendant at Cainsville—J. W. Henderson—attended to the business of taking the application for the insurance, forwarding it to the head office, delivering the policy to the assured, collecting the premium and remitting it to the head office. He also countersigned the policy and in doing all these things followed the usual course of business he had pursued for a number of years with

the consent of defendant. Among the stipulations of the policy were the following:

"No officer, agent or employee of this company shall have power or authority to waive any of the terms or conditions of this policy, either before or after loss, except only the secretary of this company, and any waiver by him must be in writing signed by him and endorsed upon, or attached to the policy. This entire policy shall be void, unless otherwise provided by written agreement, endorsed hereon or added hereto, in any of the following cases, to-wit: If at the time of loss the title or interest of the assured, in the property described in this policy, or any part thereof be less than an unqualified ownership, free and clear of all liens, equities or incumbrances. . . . If any other insurance whether valid or not exists or is placed on the property insured, or any part thereof. . . . In case there shall be any other policies or contracts of insurance on the property herein insured, with the consent of this company, as herein provided (the insured) shall recover of this company only such proportion of the loss upon any item as the sum hereby insured thereon shall bear to the whole amount of insurance thereon, whether specific or blanketed with other items, and if any such policies contain any limitations or exemptions such limitations or exemptions shall limit the proportion of the liability of this company. . . . All papers or riders attached to this policy bearing same number, and signed by the secretary of the company shall be and form a part of this policy."

On the back of the policy was the form of an assignment for use in case of the sale of the property and at the bottom of the form were the words: "The company hereby consents to the above assignment, subject to all the terms and conditions of the policy, and the questions and answers in the application."

Attached to the policy was the following "rider:" "The Legislature of the State of Missouri having by

enactment provided that no company shall take a risk on any property in said state at a ratio greater than three-fourths of the value of the property insured, it is a condition of this policy that the total insurance of the described property shall be limited to three-fourths of the cash value of such property or any item thereof, and that this company shall not be liable in case of loss or damage by fire for an amount greater than three-fourths of the actual cash value of each item of property insured by this policy (not exceeding the amount insured on each such item) at the time immediately preceding the fire, nor for more than this company's proportion of three-fourths of such cash value of each item insured, in case of other insurance thereon; and if the amount of this policy on any item therein, together with all other insurance thereon (if any other insurance is permitted in writing on the policy) exceeds three-fourths of the cash value of such property or any item thereof, it shall thereby become void to the extent of such excess; and if by reason of this clause the liability of this company shall be less than the amount of insurance thereon for which premium has been paid, this company will on demand, refund to the assured for the full term of the policy the premium received by it on the difference between the amount insured and the amount paid for total loss on such property."

Before applying for this policy Adams & Sons had procured another policy of \$2000 from another insurance agent in Cainsville, a Mr. Woodward. Henderson and defendant had knowledge of the existence of this insurance and issued the policy in question knowing that it would increase the total insurance on the stock to \$4000. On October 18, 1904, Adams & Son traded the stock to plaintiffs for some real estate. The "trading value" of the stock was placed at \$9000, and there is substantial evidence tending to show that its actual

market value exceeded that sum. If we were sitting as triers of fact we would say the actual value was not over \$6000, but in our consideration of the demurrer to the evidence we must accept as proved the facts most favorable to plaintiffs which we find supported by substantial evidence and, from this viewpoint, we give full credence to the testimony of plaintiff Sheets, who testified:

"Q. You say the stock was worth about nine thousand dollars at the time it was transferred to you? A. Yes, sir, I invoiced it after I traded it. It invoiced nine thousand three hundred dollars."

"Q. At what value did you invoice it? A. I tried to invoice it at what it was worth on the market."

The property included a stock of groceries and grocery fixtures valued at about \$400. On either the day of the purchase of the stock or the next day, plaintiff Sheets and the senior Adams took the two policies and visited the offices of Mr. Woodward and Mr. Henderson for the purpose of having the policies assigned to plaintiffs. After successfully concluding this business with Mr. Woodward, Sheets applied for and obtained an additional policy for \$1000 on the goods and then he and Adams proceeded to the office of Henderson. The nature of the business they transacted with him is a subject of serious controversy. It is the contention of defendant that Henderson was a soliciting, not a resident agent and that he had no authority to execute an assignment as defendant's representative. Henderson states he had no such authority and that to expedite the transfer he cut out a form of assignment from a blank policy, filled it out, had it signed by Adams and Sheets and sent it to the head office for approval and execution by defendant. This statement of what occurred is contradicted by Sheets who states that nothing was said about any restrictions on the authority of the agent and that as soon as he learned what was wanted he filled the blank on the back of the policy, signed it as defendant's agent

and delivered it to Sheets who took it back to the store and put it in the safe where it was destroyed in the fire. For the purposes of the demurrer to the evidence we adopt the testimony of Sheets as the true version of the transaction. On this visit Sheets applied to Henderson for an additional policy of \$1000, and the next day Henderson delivered him a policy for that amount issued by another company. So according to the evidence of plaintiffs the net result of the visits to the insurance agents was the transfer to plaintiffs of the existing policies and the increase of the insurance on the stock from \$4000 to \$6000. As to the object of plaintiffs in increasing the insurance, Sheets testified:

"At that time I intended to continue the business at Cainsville and increase my stock, to put in a ten thousand dollar stock. And after I decided not to increase the stock I cancelled this policy (the new policy) with Mr. Henderson. I never paid him anything on it at all, never paid the premium."

Henderson testified: "I wrote him then the policy in the St. Louis company for one thousand dollars and delivered it to Sheets the next day about nine o'clock. I took it up from Sheets some time later. The policy was in force about twenty-five days. It had earned \$3.50. Mr. Sheets paid me the short rates on the policy when I took it up. The premium was \$17 and the policy was to run for one year."

The policy of \$1000 procured from Woodward was cancelled by the insurer in November or early in December. The old policy of \$2000 issued to Adams & Son through Woodward's office was cancelled by the insurer December 10, 1904. After this there remained no other insurance on the stock but the policy in controversy.

The fire occurred the day after the cancellation by Woodward of the \$2000 policy and resulted in the total destruction of the stock. In November preceding the fire plaintiff sold the stock of groceries in bulk for \$400.

its reasonable value, but did not notify defendant of the sale. The argument of defendant that the policy was not in force at the time of the fire may be reduced to three main propositions, viz., first: The assignment of the policy from Adams & Son to plaintiffs was not consummated in accordance with the provisions of the contract and, therefore, was ineffective though Henderson, in fact, attempted to assume authority to act as the vice-principal of defendant in its execution. Second: The increase in the insurance was in direct violation of the contract and the forfeiture of the policy was the penalty imposed therefor by the contract. Third: The sale in bulk of a part of the stock without the consent of the insurer incurred a forfeiture of the policy. We shall dispose of these propositions in the order of their statement.

I. This proposition is predicated on the contention that Henderson was a special agent of limited powers authorized only to solicit insurance. One of defendant's general officers testified:

"The Iowa State Insurance Company has two classes of agents in Missouri, recording and soliciting. The character of business done by soliciting agents is to take applications and send them in to the company. Soliciting agents have no authority to consent to the transfer of policies. They have no authority to modify or change any of the terms of the policy. The soliciting agent takes the applications, sends them to the company, and, if accepted, the company writes the policy, sends it to the agent, and the policy is delivered by the agent to the assured. Henderson belongs to the soliciting class of agents. He had no authority to issue policies and never issued policies."

With this statement of the character of Henderson's agency as a text counsel for defendant rely on the well settled rule often recognized in this state "that a mere soliciting agent of an insurance company intrusted

with the receipt of applications for insurance and premiums therefor cannot, without more, bind the company by his oral contract for present insurance pending the action of the company on the applications forwarded by him as agent." [Embree v. Insurance Co., 62 Mo. App. 132.]

In *Trask v. Ins. Co.*, 58 Mo. App. 431, a case much relied on by defendant, it was held by the St. Louis Court of Appeals that where the agency contract disclosed that the agent was authorized "only to receive and forward to this company applications for insurance and to collect and transmit premiums therefor" and reserved to the company the right to accept or reject any and all such applications and the evidence failed to show "a holding out of said special agent by defendant as having any greater authority than that conferred upon him by the terms of the special agency under which he was employed," the agent had no authority to make a contract of insurance binding upon his principal.

We concede the soundness of this doctrine and, further, we shall concede that in the agency contract defendant did curtail the authority of its agent to that of a mere solicitor of insurance. It remains to be seen whether or not defendant held its agent out to the world as one possessed of general powers including that of *making* contracts of insurance on its behalf. The policy on its face contemplates that a sale of the property may be made while the insurance is in force and makes provision for the assignment of the policy with the consent of the company. There is no provision that the indorsement of the company to the assignment must be made by any particular officer or that the policy must be sent to the home office for such purpose. It is stipulated that the policy shall be void when the property is alienated or incumbered without the consent of the company and that the secretary of the company is the only officer or agent possessing authority to waive any of the terms and conditions of the policy. But such stipula-

tions constitute no limitation on the power of general agents to make contracts of insurance and as "a renewal of a policy is, in effect, a new contract of assurance" (*Jenkins v. Ins. Co.*, 171 Mo. 383), so the assignment of a policy with the written consent of the insured in legal effect is the making of a new contract and an agent clothed with authority to make contracts of insurance is clothed with authority to indorse his principal's consent to the assignment of a policy. We quote approvingly from the opinion of the Supreme Court of Nebraska in *Insurance Co. v. Rounds*, 53 N. W. Rep. 660:

"It is urged that the indorsement was not binding until approved by the company, and that it, immediately after receiving notice thereof rejected it, and ordered the policy cancelled. There is no provision of the policy which requires that such indorsement should be made by any particular officer of the company, or that the policy must be sent to the home office of the company for such purpose. It only specifies that the policy shall be void where the property insured is alienated or incumbered, unless the consent of the company is indorsed on the policy. A local agent having the power to make a contract of insurance has authority to make indorsements upon a policy of insurance like the one in question, and, when so made, the company will be bound thereby."

Indeed, the officer of defendant, from whose testimony we quoted, admits the authority of general agents of defendant to "grant assignments" without sending the policies in to the home office. He testified:

"Q. The only difference between your recording agents and your soliciting agents is, in one of them the policy is filled out at the office and sent to the soliciting agent for his countersigning and delivery, and the other keeps the policies on hand and issues them? A. No, sir.

"Q. Isn't there that difference? A. Yes, sir.

"Q. What else is there? A. *The recording agent has the power to make endorsements, grant assignments.*

"Q. The recording agents fill in these blanks? A. Yes, sir.

"Q. And the policies are signed by the officers and placed in his charge? A. Yes, sir.

"Q. Then he countersigns and delivers them? A. Yes, sir.

"Q. And the other way, it is filled out by the company at the home office, signed by the president and secretary, then sent to the soliciting agent for his countersigning and delivery? A. Yes, sir."

If Henderson was held out by defendant as a general agent authorized to make contracts of insurance it is bound by his acts performed within the scope of his apparent authority, among them, the act of indorsing defendant's consent to the assignment in question. In addition to taking the application for policies and collecting premiums, Henderson *countersigned* all policies issued through his office and delivered them. We are not holding that this practice, in the absence of the statute to which we shall presently refer, would characterize the agency as general instead of special. We express no opinion on that point since we find the characterization is made by the statute which defendant sought to have declared unconstitutional. That statute provides:

"Foreign companies admitted to do business in this state shall make contracts of insurance upon property or interests therein only by lawfully constituted and resident agents, who shall countersign all policies so issued. And any such insurance company who shall violate any provision of this section shall suffer a revocation of its authority by the superintendent of insurance to do business in this state, in addition to the penalty prescribed in section 8002, such revocation to be for the term of one year."

This is the first occasion this statute, which was enacted in 1897, has been before a court of last resort for interpretation. The meaning of the statute is clear and one does not have to go far to ascertain the legislative intent that prompted its enactment. Obviously one of its main purposes was to put a stop to the irritating and unjust practice indulged in by some insurers of adroitly phrasing their agency contracts in a way to bestow general powers on their agents, who come in direct contact with the public, when such powers relate to benefits flowing to the company, and to invest such agents with no power to represent the company when the benefits of the insured are involved. Such attempted aggressions frequently have been repelled by the courts of this state under the doctrine that "an insurance company cannot make its local agent the medium through which all the benefits of a policy flow from the insured to it and then deny that he has authority to represent it when the benefits of the insured are involved." [Nickell v. Ins. Co., 144 Mo. 420.]

And the Legislature evidently thought further to discourage them by requiring all contracts of insurance to be made by regularly constituted and lawfully licensed resident agents who shall countersign the policies so that when the insured received his policy he would know that the local agent who countersigned it possessed the power to make contracts for his company and to bind it as a general or as defendant calls it a recording agent. When plaintiffs saw the name of Henderson countersigned on the policy they were justified in assuming he had authority to consent to the assignment and we hold that defendant is estopped by the provisions of the statute from disputing such authority. The contention that he was only a soliciting agent necessarily is an assertion that defendant made a contract of insurance in this state in violation of the law, since, in such case it would have made the contract of insurance without the intervention of a resident agent duly

authorized to make such contracts. Defendant will not be suffered to stand on such immoral ground and we shall assume for the purposes of this case that the countersigning of the policy was in compliance with the statute. We are not saying that a foreign insurance company may not employ soliciting agents of limited powers in this state, but we are holding that countersigning resident agents are presumed to possess authority to make contracts of insurance for their principals.

II. The additional insurance was taken out with the knowledge and consent of Henderson, the local agent, and, according to evidence of plaintiffs, did not increase the total insurance beyond the limit fixed by the "rider" attached to the policy. The second proposition must be ruled against defendant under the rule applied in *Bush v. Ins. Co.*, 85 Mo. App. 155, where speaking through ELLISON, J., we said: "There was a three-fourths value clause attached to the policy as a 'rider' in the following words. 'Three-Fourth Value Clause. It is a part of the consideration of this policy, and the basis upon which the rate of premium is fixed, that in the event of loss, this company shall not be liable for a greater amount than three-fourths of the actual cash value of the property covered by this policy at the time of such loss, and, in case of other insurance, whether policies are concurrent or not, then for only its pro rata proportion of such three-fourths value. Total insurance permitted is hereby limited to three-fourths of the actual cash value of the property hereby conveyed and to be concurrent herewith.'"

We had occasion to consider a clause of like character to this, though expressed in broader language, in *Dodan v. Ins. Co.*, decided at this term, and we there held the clause to be a permit for other insurance up to the three-fourths limit; the clause in this "rider" reading: "Total insurance permitted is hereby limited to three-fourths of the actual cash value of the

property hereby covered and to be concurrent herewith," meaning that permission is thereby granted the assured to procure that amount of insurance. [Palatine Ins. Co. v. Ewing, 92 Fed. Rep. 111; Ins. Co. v. Bussell, 48 S. W. Rep. (Tenn.) 703.]”

III. We think the alienation clause in the policy was not intended to apply to sales made in the course of business from stocks of merchandise. The rule thus is stated in 2 Cooley's Briefs on the Law of Insurance, 1746: "An insurance on a stock of goods which in the nature of business will be continually changed, is an insurance on the stock, and not on the specific goods in stock at the time the policy issued, so that sale from the stock and removal thereof will not forfeit the policy though it contains a non-alienation clause."

A sale in bulk of the entire stock, or of enough thereof to materially affect the risk would constitute a breach of the alienation clause but a sale in bulk of goods worth \$400, out of a stock valued at \$9000, cannot be considered as an enhancement of the risk, especially where the value of the stock remaining still exceeds by more than 33 1-3 per cent the amount of the outstanding insurance. A sale of this character should be treated as one made in the ordinary course of a merchant's business.

We have examined the objections to the rulings on the evidence and find that no prejudicial error was committed against defendant in these rulings. The judgment is affirmed. All concur.

FIRST NATIONAL BANK OF INDEPENDENCE,
Respondent, v. **GEORGIA A. SHEWALTER,** Ap-
pellant.

Kansas City Court of Appeals, January 30. 1911.

1. **TAXBILLS: Sufficiency of Petition.** A petition which pleads the taxbill *in haec verba*, in a case where the statute gives prima facie effect to such taxbills will be deemed sufficient if it alleges the making of the taxbill; the contents of such taxbills with the date thereof; the assignment; the filing of the same; and that the defendant owned the lot described and against which the lien was sought to be enforced.
2. ———: **Pleading: Special Defenses.** Where the taxbill in question was signed only by the city clerk, and the petition alleges that it was so executed "by authority of the ordinance of said city," the defendant can not show this matter in defense, by pleading the general issue, but must specially plead the facts constituting such defense in his answer.
3. ———: ———: **General Issue.** An objection that the taxbill does not recite performance of some preliminary steps does not go to the sufficiency of the petition, but relates to matters of defense which might be tendered under the general issue.
4. ———: **Signing: Ministerial Act.** In the absence of statutory command, the council, by ordinance, may delegate authority to the city clerk to sign special taxbills for the signing of such documents is a purely ministerial act.
5. ———: **Right of National Bank to Purchase.** Where the petition averred that plaintiff, a national bank, purchased the taxbill for a valuable consideration, such an allegation, where nothing to the contrary appears, implies that the purchase was one that the bank had authority to make.
6. ———: ———: **Ultra Vires.** Even had it appeared that the purchase of special taxbills by a national bank was an *ultra vires* act, the purchase would not be held void, but only voidable, and as to the owners of the land was valid in any event. Its validity could not be assailed except in a direct proceeding prosecuted for that purpose by the government.

Bank v. Shewalter.

Appeal from Jackson Circuit Court.—*Hon. Walter A. Powell*, Judge.

AFFIRMED.

J. D. Shewalter for appellant.

Paxton & Rose for respondent.

JOHNSON, J.—This is a suit to enforce the lien of a special taxbill issued by Independence, a city of the third class, on account of the grading and paving of one of its public streets. The court sustained the validity of the taxbill and defendant appealed from the judgment rendered for plaintiff.

No bill of exceptions is in the record and the issue here is the sufficiency of the petition to state a cause of action. The petition alleges that plaintiff is the owner and holder of the taxbill; that the taxbill, the contents and date of which is set out, was issued by the city of Independence, a city of the third class; that plaintiff for a valuable consideration purchased the taxbill from the contractor to whom it was issued; that the contractor duly assigned the bill in writing to plaintiff and that defendant owned the property described. It appears the taxbill was signed only by the city clerk and the petition alleges that it was so executed "by authority of the ordinance of said city."

We find the petition contains all requisite averments. [City of Carthage v. Badgley, 73 Mo. App. 123; Joplin ex rel. v. Hollingshead, 123 Mo. App. 602.] In these cases the rule is stated that a petition to enforce a special taxbill which pleads the taxbill in *hacc verba*, in a case where the statute gives prima facie effect to such taxbills, will be deemed sufficient if it alleges "first, the making of the taxbill; second, the contents of such taxbill with dates thereof; third, the assignment; fourth, the filing of the same, and fifth, that the defendant owned the lot described and against which the lien was sought to be enforced."

These are the constitutive facts and as we said in the opinion from which we have quoted (Carthage v. Badgley, supra): "If the owner of the lot thus named desires to show either the imperfect execution of the work, or that the doing thereof was not properly authorized, or any other fact which goes to the legality or extent of the charge, he cannot do so by pleading the general issue, as was done in this case, but he must specially plead the facts constituting such defense in his answer, so as to notify the plaintiff of the grounds upon which he relies to defeat the enforcement of the taxbill."

The objection of defendant that the taxbill does not recite performance of some preliminary steps in the proceeding does not go to the sufficiency of the petition, but relates to matters of defense which in Cushing v. Powell, 130 Mo. App. 576, we held might be tendered under the general issue. :

There is no merit in the further objection that the city council could not delegate authority to the city clerk to sign special taxbills. The signing of such documents is a purely ministerial act (State v. Reber, 126 S. W. 397) and no good reason is suggested for holding that the chief executive of the municipality must perform that act or that his name be signed. In the absence of statutory command the council, by ordinance, may designate how and by whom such instrument shall be signed.

Only one other point argued by defendant is of enough merit to call for notice here. It is insisted that since plaintiff is a national bank it had no authority to purchase special taxbills. The averment that plaintiff purchased the taxbill for a valuable consideration does not mean necessarily that the purchase was made as an investment or for speculation but is comprehensive enough to include any acquisition of title by purchase, including, for example, the taking of additional security for an existing debt to the bank created *bona fides* in the course of lawful business. So far as we are

advised the authority of a national bank to protect itself against possible loss by taking additional collateral security for an existing loan has not been seriously questioned by any court of last resort. It was held in *Bank v. Bank*, 92 U. S. 122, that while by implication a national bank is prohibited from dealing in stock, it may take stock, in payment or compromise of a doubtful debt, in order to avoid loss and with a view to convert the stock into money. And for the same purpose it may take a mortgage on real estate (*Bank v. Matthews*, 98 U. S. 624), or accept a deed conveying the fee simple title to real estate. Nothing to the contrary appearing, the allegation that such bank acquired by purchase the title to stock, bonds, or other kinds of paper property implies that the purchase was one it had authority to make.

Moreover, even if it had appeared that the act in question was *ultra vires* the purchase would not be held void but only voidable. As to defendant it was valid in any event and its validity could not be assailed except in a direct proceeding prosecuted for that purpose by the government. [*Hall v. Bank*, 145 Mo. 418.]

The judgment is affirmed. All concur.

JAMES L. ROBERTS, Respondent, v. WABASH
RAILROAD COMPANY, Appellant.

Kansas City Court of Appeals, January 16, 1911.

1. **EVIDENCE: Admission of Vice-Principal: Res Gestae.** The admission of defendant's general passenger agent, in a subsequent conversation with plaintiff, that the company was always having trouble with their agent who committed the assault on plaintiff, was offered in proof. *Held*, that such evidence was incompetent under the rule that declarations of an agent in relation to a matter within the scope of his agency are admissible only when made at the time of the occurrence to which they relate.

Roberts v. Railroad.

2. ———: ———: ———: **Semble.** It seems that the rule ought to be that the statements of the vice-principal of a corporation ought to be admissible whether they be a part of the *res gestae* or not, as otherwise there would be two different rules governing the admission of evidence as to a given transaction in which the discrimination is in favor of the corporation and against the natural person.
3. **CARRIERS OF PASSENGERS: Assault: Instructions: Ejection from Office.** In an action for damages for injuries caused by an assault on plaintiff by defendant's telegraph operator in ejecting plaintiff from the office, an instruction that it is not necessary that plaintiff should have received a special invitation to enter into the private office for the purpose of transacting business, and the fact that plaintiff may have entered said office without any special invitation, would of itself give defendant no right to assault or forcibly eject the plaintiff. *Held*, erroneous.
4. ———: **Invitation to Enter Telegraph Office: Right to Eject.** A party who wishes to send a telegram at the office of the railway company, at a station where he is changing cars from one branch of defendant's railway to its main line, has no right to enter the office, where the defendant's telegraph operator was engaged in performing the duties of his position, without an invitation to do so, and under certain circumstances the operator would have the right to eject a passenger or any other person from his private office, if they should remain against his will, provided he did not use unnecessary force.
5. ———: **Instructions: Ejection from Telegraph Office: Omission of Defendant's Evidence.** An instruction is prejudicial that leaves out of consideration defendant's evidence to the effect that plaintiff had been invited by the operator, while he was busy with his instrument, to leave, and that he would wait on plaintiff when he had time.
6. **AGENCY: Tortfeasor Employed by Two Principals.** Where an operator, at the time of the assault in question, was engaged in manipulating his instrument in connection with the operation of the trains of the defendant, and was subject to be discharged at the will of the defendant, and where he was solicited by plaintiff to send a private message, the duties that the operator performed for the private telegraph company being merely incidental. *Held*, that the operator at the time was engaged in the performance of his duties as the agent of the defendant railroad company, and was not acting in the line of his duty as the agent of the Western Union Telegraph Company.
7. **APPELLATE PRACTICE: Review of Evidence: Motion for Nonsuit.** The rule that appellate courts have no authority

to pass upon the weight or credibility of the evidence, prevents an appellate court from reviewing an action of the trial court in overruling defendant's motion for a nonsuit, although under the facts and circumstances of the case, the appellate court thinks that the plaintiff should not have prevailed, provided that the jury accepted plaintiff's evidence as true, notwithstanding that the great preponderance of the evidence on the part of the defendant was otherwise.

Appeal from Adair Circuit Court.—*Hon. Nat M. Shelton*, Judge.

REVERSED AND REMANDED.

James L. Minnis and Higbee & Mills for appellant.

Campbell & Ellison, C. E. Munell, R. M. Reynolds and *George N. Davis* for respondent.

BROADDUS, P. J.—The plaintiff sues the defendant for damages for an assault committed on him by the defendant's agent at Salisbury where he was to change cars from the Glasgow branch of defendant's railroad to its main line.

The plaintiff was a young man of slight build. Burkhardt, the agent, alleged to have committed the assault was a large, heavy man. On the morning of the day of the occurrence plaintiff took passage from Glasgow by way of Salisbury to Macon, Missouri. When he arrived at Salisbury, for the purpose of sending a telegram to his sister-in-law at Macon, he went to the ticket window of the ladies' room in the defendant's station, and enquired in reference to sending a telegram, whereupon a young man about seventeen years of age, stepped up to the window and asked him if he wanted to buy a ticket; plaintiff said no that he wanted to send a telegram. He was told by the young man to come around on the inside of the office and he would give him a telegram blank. Plaintiff went as directed and sat down and started to write his message. For the purpose of

ascertaining the time when the train would reach Macon, he looked around for some one to inform him, when he discovered there was no one in the room but defendant's operator who appeared to be busy, whereupon he got up and went out and saw the young man and spoke to him about the matter, who said to him: "You go back in there where you were, and ask the operator, he will tell you. I don't know." Plaintiff returned to the office and waited until the operator, Mr. Burkhardt, who at that time had finished the business at which he had been engaged, and said to him: "Would you please, sir, tell me what time the train gets into Macon this afternoon?" Whereupon the agent turned to him and said: "What in the hell are you asking me such a God damn fool question for?" To which the plaintiff replied: "I beg your pardon, sir, I simply wanted to know what time the train gets to Macon this afternoon." The operator said: "Don't you see I am too God damn busy to answer such fool questions as that—God damn you, get out of here I tell you." Plaintiff again repeated his inquiry as to when the train would arrive at Macon, and said if the operator would tell him he would get out. The operator said: "Don't you hear me?" and again cursed him and threatened to put him out. Plaintiff then said: "I was told to come in here by your man and I can't send the message unless I know what time the train gets to Macon," to which the operator replied: "I will put you out then God damn you, if you won't get out," and grabbed plaintiff under the chin with his arm and began dragging him out, his heels touching the floors. According to plaintiff's description of the affair: "He began dragging me out and jerking me, just as he got one hand under my chin—he grabbed me either by the vest or collar one—I know when I got out of the station my tie was half undone." I said to him let me get my umbrella if you are going to put me out." Burkhardt then swore again and said,

"I will throw your umbrella out after I throw you out." He stated that his neck was slightly abraded in the scuffle.

Plaintiff testified as to a conversation he had with a Mr. Watts, the defendant's general passenger agent, in reference to the treatment he had received at the hands of Burkhardt. At first defendant objected to the proof offered that Watts was such agent, but afterwards the objection was withdrawn. Plaintiff was then asked where the conversation occurred and what Mr. Watts said. Defendant objected to the competency of such evidence on the ground that it was not shown that he was then acting in the line of his duty. The objection was overruled, and the witness was permitted to answer. He stated that he was introduced to Mr. Watts in the lobby of a hotel at Moberly; that Watts asked him: "Is your name Roberts? . . . are you from Marshall? You are the man who had trouble with our man Burkhardt at Salisbury. I don't know what is the matter with that damn fellow Burkhardt, he is always getting into scraps and we always have trouble with him." It appeared that Burkhardt was acting in the double capacity as operator of both the Western Union Telegraph Company and the defendant.

The defendant instead of reciting the facts upon which it relies, most of its statement is taken up with excerpts from the testimony. This mode of presenting a case to this court is not very satisfactory, and imposes upon us the duty practically to go over the entire record in order to get a proper understanding of the case; which we can do just as effectually without as with the aid of such a statement.

However, we gather from the record that there was a sharp conflict between the testimony of plaintiff and that of defendant. Burkhardt testified substantially that: While he was engaged telegraphing some one came to the window and enquired to know what time the train would arrive at Macon; that being busy he said

to him, "kinder abrupt" that he would wait on him in a minute; that he continued with his work, and in a short time the chair in which he was sitting was pulled around, which had the effect of throwing his hand off the instrument he was working; that he reached up and caught plaintiff and took him and set him out the office door and into the waiting room; that as he attempted to close the door, plaintiff rushed back to get into the door, but that he fastened it against him; and that plaintiff then asked for his umbrella and hat, which he handed out through the window.

Two of defendant's conductors who were present testified at the trial. Conductor Malone stated that there was no commotion; that he heard no abusive language or threats on the part of Burkhardt. He was asked to describe how Burkhardt had hold of plaintiff. His answer was that: "About as near as I could describe it, it put me in mind of a girl about twelve years old carrying a child about four years old in the house he didn't want to go." His testimony was that at the time plaintiff asked Burkhardt about the time of the arrival of the train at Macon, he was getting orders for his train.

Shields, the other conductor, testified that; he went to the window of the men's waiting room with the intention of asking Burkhardt what was on board, that; "this little man Roberts was at the window with his hands and cane and making pretty much of a to do trying to get Burkhardt to come over and wait on him," that he passed by him and went into the room and he supposed that plaintiff slipped in after him; that plaintiff walked up and put his hand on Burkhardt's shoulder and said he would demand an answer; that Burkhardt looked up and said, "You get out there where you came from and I will wait on you when I get ready; "that plaintiff still insisted on an answer; that Burkhardt then arose and pulled up plaintiff and walked out with him; that it was done in less time than it took him

to tell it; that "he picked him up like a child would a rag doll;" and that Burkhardt used no profane or abusive language.

The plaintiff recovered in the sum of \$50 compensatory and \$250 punitive damages. The defendant appealed.

It is contended by appellant that the court committed error in admitting the testimony as to what Watts, the general passenger agent of defendant, said about Burkhardt. It is a rule of law that declarations of an agent in relation to a matter within the scope of his agency are admissible only when made at the time of the occurrence to which they relate. [McDermott v. Railroad Co., 73 Mo. 516; O'Bryan v. Kinney, 74 Mo. 125; Frye v. Ry. Co., 200 Mo. 377.] While such is the well established rule it is also as well established that a railroad company or any other master is chargeable with the knowledge of the incompetency of one of its employees, when it is shown that the vice-principal had such knowledge. [McDermott v. Railroad Co., *supra*.] "Language used by the superintendent of a street railway company, admitting and justifying an assault of one of its drivers, was held to bind the company." [Mulecek v. Ry. Co., 57 Mo. 17.]

The admission of the evidence was incompetent under the first three cases cited. Whether the rule in the Mulecek case is in conflict with the subsequent decisions cited, it is not necessary to decide, but perhaps it is admissible to say, that, the rule that the statements of the vice-principal of a corporation ought to be admissible whether they be a part of the *res gestae* or not. The rule as to natural persons is that admissions or statements as to the subject matter, made by a party at any time are admissible against him. And as a corporation cannot speak except by its vice-principal, his statements and admissions ought to be placed upon the same footing as those of a natural person, otherwise we have two different rules of evidence governing the admission of

evidence as to a given transaction, in which the discrimination is in favor of the corporation. For instance in a suit by A. against C., a corporation, it is competent to prove what A. said about the matter in dispute whether it be a part of the *res gestae* or not, but it is not competent to prove what the vice-principal said except it be confined to the occurrence—the *res gestae*.

Defendant claims that the court committed error in giving instruction numbered one at the instance of the plaintiff. It reads as follows: "The court instructs the jury that in this case it is not necessary that plaintiff should have received a special invitation from any employee or servant of the defendant to enter into the private office of said defendant for the purpose of transacting business and the fact that plaintiff may have entered said office without any special invitation, if you find from the evidence he did so; would of itself give defendant no right to assault or forcibly eject the plaintiff, if you find from the evidence defendant did assault or forcibly eject him."

The objection is well taken. In the first place we do not think that plaintiff had any right to enter the office where the telegraph operator was engaged in performing the duties of his position without an invitation to do so. The duties of a telegraph operator for a railroad are of such grave importance, that it is necessary that at times his attention should be entirely directed to matters that connect him with the operation of trains, both those carrying freight and passengers, and their safe conduct, upon which depend not only the safety of the property of the carrier, but also the property of the shipper as well as the security of the persons and lives of the passengers. We cannot imagine a duty that demands more careful attention than that required of such a servant. An interruption at a critical moment is liable to so distract the attention of the operator, so as to cause him to commit an error causing a collision of trains or produce some other dire mishap resulting in a great loss

of property and endangering the lives of passengers. And we do not think that under certain circumstances the operator would not have the right to eject a passenger or any other person from his private office if they should remain against his will if he did not use unnecessary force.

The instruction was prejudicial for it left out of consideration the defendant's evidence to the effect; that plaintiff had been invited by the operator while he was busy with his instrument to leave and that he would wait on him when he had time. If this was true, which was a matter for the jury to say, whether the operator had the right to eject him under the circumstances.

And the instruction is in conflict with that of defendant numbered one, which is to the effect in part, that if plaintiff went into the operator's office with or without invitation, it was his duty to have left the office if invited to do so, otherwise the operator had the right to eject him by the exercise of reasonable force.

The contention is made that the operator at the time was not in the performance of his duties as the agent of the company, but in the line of his duty as agent of the Telegraph Company. The facts are otherwise. We gather from the evidence that he was engaged in manipulating his instrument in connection with the operation of trains of the defendant. Because he was solicited by plaintiff to send a private message to Macon does not go to show that he was engaged in telegraphing for the Telegraph Company. It proves nothing. He was the employee and as the evidence tends to show, subject to be discharged at the will of the defendant. The duties he performed for the Telegraph Company were merely incidental and subservient to his employment as agent of the defendant. The case falls within the rule in the case of the Standard Oil Co. v. Anderson, 212 U. S. 215.

Many other errors are assigned which upon examination we deem not well taken. Finally it is insisted

that the court acted arbitrarily in overruling defendant's motion for a non-suit, and that it was such an abuse of discretion that this court should review its action. The rule is that appellate courts are bound by certain limitations among which is one that they have no authority to pass upon the weight or credibility of evidence. It is contended by defendant that under the facts and circumstances of the case the plaintiff should not have prevailed. So we think, but as the plaintiff testified that the operator of the defendant cursed, abused and assaulted him in a violent manner, it was for the jury to accept his evidence as true, notwithstanding, the great preponderance of the evidence on the part of the defendant was otherwise. In our opinion the plaintiff made a weak showing, but that was a matter for the trial court to consider. That court having before it the witnesses and hearing most of them testify in person was a far better judge of the weight and credibility of their evidence than we can possibly be. On account of the error mentioned, we think the cause should be reversed.

Reversed and remanded. All concur.

**CENTRAL COFFEE AND SPICE COMPANY, Re-
spondent, v. F. I. WELBORN, Appellant.**

Kansas City Court of Appeals, January 30, 1911.

1. **TRESPASS: Malicious Attachment: Actions Distinguished.** The defendant in this action committed the trespass in question, by directing the constable to levy on the goods of the plaintiff corporation, after the defendant in the original attachment suit, who was also president of the corporation, had informed the constable, in the presence of the plaintiff in the original attachment suit (who was the defendant in this action) that the goods belonged to plaintiff herein, a corporation, which was not a party to the original attachment suit. *Held*, that where the gist of the petition is that the defendant willfully,

maliciously and wrongfully caused the constable to seize plaintiff's goods, well knowing that they belonged to plaintiff, and the petition in addition sets out the foregoing facts, the petition states a cause of action for trespass *vi et armis*, and not one for malicious and wrongful prosecution of the attachment. Hence an allegation that the prosecution was without probable cause is unnecessary.

2. **DAMAGES: Trespass: Distinguished from Malicious Attachment.** In an action for trespass *vi et armis* for willfully, maliciously and wrongfully levying upon plaintiff's goods, where the plaintiff corporation was not a party to the original attachment suit by virtue of which the levy was made, it was error to instruct the jury that they might take into consideration, in assessing compensatory damages, the value and amount of money and time expended by the corporation in defending said attachment suit.
3. **DAMAGES, PUNITIVE: Trespass.** Where, in another action to which the plaintiff corporation was not a party, the defendant caused the constable to seize plaintiff's goods, knowing that they were its property, the act was wrongful, intentional, and malicious, provided the jury so found, and an instruction, in this action by the plaintiff corporation for trespass *vi et armis*, that the jury might allow punitive damages was proper.
4. **APPELLATE PRACTICE: Error: Cured by Remittitur.** In an action for trespass *vi et armis*, where the jury rightfully found punitive damages, but also, under an erroneous instruction, found compensatory damages, the cause will stand reversed and remanded unless the plaintiff enters a remittitur of the amount allowed as compensatory damages.

Appeal from Jackson Circuit Court.—*Hon. John G. Park, Judge.*

AFFIRMED, CONDITIONALLY.

W. F. Riggs for appellant.

W. F. Zumbrunn for respondent.

BROADDUS, P. J.—This is a suit for an alleged trespass. On February 9, 1909, J. W. Periman and the defendant, Welborn, commenced a suit in a justice court and sued out a writ of attachment against the property

of Nancy and A. L. Welsh, non-residents of the State of Missouri. A L. Welsh, the president of the plaintiff corporation, was in the possession of a store of goods in Kansas City, Missouri. When the constable came to the store, he asked Welsh who owned the goods. He told him that he, Welsh, owned them. The constable then informed him that he had a writ of attachment and of his intention to levy on them; Welsh then informed the constable that the goods belonged to the plaintiff herein, the Central Coffee & Spice Company. The constable levied the attachment on the goods, but informed Welsh that if they were the property of said company he would release them, if he would make an affidavit to that effect. This was agreed to, and an attorney was sent for and in about two hours afterwards the affidavit was prepared and executed, and the constable released the goods. At the same time the constable made a statutory levy on twenty shares of stock, standing in the name of A. L. and Nancy Welsh.

There was evidence tending to show that when the constable came to levy on the goods he was accompanied by the defendant. Welsh was asked whether defendant made any remark regarding the attachment suit, and what he intended to do after the constable came back and released to him the key to the store. A. "Why, he said if he could not get it one way, he would get it another," referring we presume to his debt. Witness further testified that defendant was, "very angry and mad all the time he was there." He was allowed to state over the defendant's objection that he paid \$35 as a fee to his lawyer to get the property released. He was allowed to state over defendant's objections whether he lost any of the time of his employees during the existence of the levy. His answer was that, he had three employees and that he lost their services for the afternoon of that day. That he paid one of them at the rate of \$10.50 and the other two \$15 a week.

The constable was called to testify as to the levy, to which defendant objected. His testimony is about as stated by Welsh. He also testified over the objections of defendant that defendant directed him to levy on the goods.

The defendant showed that the attachment was sustained and judgment rendered on the demand, as against the said certificate of stock in the plaintiff corporation.

The court instructed the jury in substance, if they found that defendant knew that the goods were the property of plaintiff and directed the constable to seize them under the writ of attachment, their verdict should be for plaintiff and they should assess its recovery in such sum as would compensate it for all damages and loss as described in the evidence; and that in assessing such damages by way of compensation, they were at liberty to take into consideration the value and amount of money and time expended in defending said attachment suit, if any, not to exceed fifty dollars; and further that if the jury believed from the evidence that defendant, knowing the goods levied upon belonged to plaintiff, did maliciously and wrongfully direct and secure a levy upon the goods of plaintiff, that in addition to the actual damages sustained by the plaintiff they might assess punitive damages in such sum as they might think proper, not exceeding \$500 as a warning to others.

The jury returned a verdict for \$50 compensatory damages, and for \$250 punitive damages.

The appellant insists that the petition does not state a cause of action, for the reason, from what we gather from his argument, that it does not allege that the prosecution was without probable cause. It seems that appellant entertains the idea that this is an action for the wrongful suing out and prosecution of the attachment. But it is not such. The facts alleged in the petition makes the case one for trespass *vi et armis*.

And he further insists, that as the attachment was sustained, the plaintiff was not entitled to recover. But the gist of the cause of action as set forth, is, that the defendant willfully, maliciously and wrongfully caused the constable, under the writ of attachment issued, to seize plaintiff's goods well knowing that they belonged to the plaintiff. This was a statement of a cause of action in trespass and not for wrongful and malicious prosecution of the attachment.

The court seemed to have fallen into the error, that the action was for wrongful prosecution of the attachment, in telling the jury to take into consideration any damages plaintiff may have sustained and money expended in defending the damage suit. As the defendant sustained the attachment and recovered judgment against the said shares of stock, it was a successful and justifiable proceeding, and plaintiff suffered no injury thereby. And moreover, he was not a party to the litigation in any way, as he neither pleaded nor was he impleaded in the cause. The action stated was not for the wrongful suing out and prosecution of the attachment, but was specifically one for causing the writ therein to be wrongfully levied on plaintiff's goods, who was not a party to the proceedings.

If the defendant caused the constable to seize plaintiff's goods knowing that they were its property, the act was wrongful, intentional and malicious, and without excuse or justification; all of which was a matter for the jury.

The instruction to the jury that they might allow punitive damages was proper under the allegations and evidence. The rule in such cases is stated in *Buckley v. Knapp*, 48 Mo. 152, to be that: "In all actions for tort, whether for assault and battery, or for trespass or libel or slander, where there are circumstances of oppression, malice or negligence, exemplary damages are allowed, not only to compensate the sufferer, but

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to punish the offender." [Baxter v. Magill, 127 Mo. App. 392.]

Many errors are assigned by appellant which we consider immaterial. For error noted the cause will stand reversed and remanded, unless the respondent within ten days enters a remittitur of the balance, fifty dollars allowed as compensatory damages by the jury. If such remittitur be made the cause will stand affirmed. All concur.

ONEL MUNDEN, by next friend, Appellant, v. P. S.
HARRIS et al., Respondents.

Kansas City Court of Appeals, January 30, 1911.

1. **RIGHT OF PRIVACY: Property: Injunction.** The right of privacy is a legal right of property, the principle of which has been ever recognized and it is entitled to protection at the hand of the courts. Its invasion may be restrained in equity by injunction.
2. ———: **Action at Law: Damages: Pleading.** General damages may be recovered in an action at law for a violation of the right of privacy, without an allegation of special damage. And if malice be shown, exemplary damages may be had.
3. ———: ———: **Picture: Advertisement.** If one published the picture of another without his consent, it is an invasion of his right of privacy and a violation of his right of property, which may be restrained by injunction, or redressed in damages, both general and special.
4. ———: **Enjoyment of Life: Seclusion.** The right of privacy includes the right to enjoy life and pursue happiness, subject only to the rights of others. A person may therefore adopt a life of seclusion with a right to remain undisturbed if he so desires.
5. ———: **Waiver of Right: Public Character: Society.** Though one has the right of privacy in his picture as a right of property, he may waive the right by becoming a public character, or by conduct exciting public interest. And such right does not subvert those rights in others which spring from social and business conditions, whereby they may freely speak of and refer to every other person in the social organization, so long as it is not slander.

Munden v. Harris.

6. ———: **Picture: Libel: Advertisement.** Where persons in business published a child's picture connected with the following words as an advertisement, viz: "Papa is going to buy mamma an Elgin watch for a present, and some one (I mustn't tell who) is going to buy my big sister a diamond ring. So don't you think you ought to buy me something? The payments are so easy, you'll never miss the money, if you get it of Harris-Goar Co., 1207 Grand Ave., Kansas City Mo. Gifts for Everybody, Everywhere in their Free Catalogue." It was held to be a libel on the child for which general and exemplary damages could be recovered.
7. ———: **Infant: Tender Years: Trespass.** An infant of tender years, though *doli incapax*, may be liable for compensatory damages for trespass, as malice is not necessary to that action. But punitive damages cannot be recovered in such a case.
8. **INFANT: Tender Years: Libel.** An infant of tender years, too young to be capable of malice or evil intent, cannot be guilty of libel or slander. And the law will adopt the age fixed by the common law for responsibility for crime and it is held that an infant under seven years of age cannot be guilty of libel or slander, since he is *doli incapax*.
9. ———: **Libel.** Notwithstanding an infant is *doli incapax* and incapable of libel or slander, yet he may be libelled or slandered, since the two conditions are not correlative.
10. ———: **Tender Years: Ridicule.** An infant five years of age may be libelled by publication of his picture in connection with words purporting to have been uttered by him which would render him liable to the contempt and ridicule of his fellows.

Appeal from Jackson Circuit Court.—*Hon. John G. Park*, Judge.

REVERSED AND REMANDED.

John C. Nipp for appellant.

(1) The appellant has a legal right of privacy, as alleged in the first count, and without his consent no one has the right to use his photograph as an advertisement to exploit goods for sale. It is not necessary that special damages be averred. *Pavesich v. Life Ins. Co.*, 122 Ga. 190, 50 S. E. 68; *Rhodes v. Sperry & Hutchinson Co.*, 193 N. Y. 223, 85 N. E. 1097; *Foster-Milburn*

Co. v. Chinn, 120 S. W. (Ky.) 364; Peck v. Tribune Co., 214 U. S. 185 (1909). (2) The allegations and matters set forth in the second count constitute a libel, in that the printed portion of the advertisement is a falsehood which was never uttered by the plaintiff, and which imputes to him a falsehood and tends to expose him to public hatred, contempt and ridicule, as being a liar. Riley v. Lee, 88 Ky. 603, 11 S. W. 713; Monson v. Lathrop, 96 Wis. 386, 71 N. W. 596; R. S. 1909, sec. 4818; Colvard v. Black, 110 Ga. 642, 36 S. E. 80; Triggs v. Sun Printing Ass'n, 179 N. Y. 144, 71 N. E. 739. (3) The appellant's first amended petition set forth the actual damages in each count sufficiently. Nicholson v. Rogers, 129 Mo. 139; Hall v. Jennings, 87 Mo. App. 633. (4) Each count of the petition states a cause of action for, at least, nominal damages. Nominal damages will sustain a prayer for punitive damages. Ferguson v. Chron. Pub. Co., 72 Mo. App. 462.

Haff & Michaels for respondents.

(1) At common law there is no "right of privacy" entitling one to damages for the unauthorized use of his photograph in connection with an advertisement. Murray v. Lith. Co., 8 Misc. 36, 28 N. Y. Supp. 271; Atkinson v. Doherty & Co., 121 Mich. 372, 80 N. W. 285; Robertson v. Folding Box Co., 171 N. Y. 538, 64 N. E. 442; Henry v. Cherry & Webb, — R. I. —, 73 Atl. 97; Peck v. Tribune Co., 154 Fed. 330, 214 U. S. 185; Edison v. Edison Polyform Co. (N. J.), 67 Atl. 392; Crutcher v. Big Four, 132 Mo. App. 311. (2) The allegations set forth in the second count of plaintiff's first amended petition do not make out a cause of action for libel. 31 Cyc. 333, 334, 337; sec. 4818, R. S. 1909; Farley v. Publishing Co., 113 Mo. App. 225; 25 Cyc. 253; Crutcher v. Big Four, 132 Mo. App. 317; Kenworthy v. Journal Co., 117 Mo. App. 327; Julian v. K. C. Star Co., 209 Mo. 35; Ukman v. Daily Record, 189 Mo. 378, 394.

ELLISON, J.—This action is stated in a petition with two counts, one for damages for disturbing plaintiff's privacy by publishing his picture without his consent; and the other for libel in publishing the picture along with false statements attributed to plaintiff. In each count punitive damages were asked, but no special damages were alleged. Defendants demurred to the petition as not stating a cause of action. The demurrer was sustained, and plaintiff refusing to amend, judgment was rendered against him and he appealed.

Plaintiff is an infant five years old and the action was brought through a "next friend" as required by statute. The facts stated in the first count of the petition are that defendants, being jewelry merchants in Kansas City, invaded plaintiff's right of privacy by willfully and maliciously using, publishing and circulating his picture for advertising their business of selling merchandise; thereby destroying his privacy and humiliating, annoying and disgracing him and exposing him to public contempt.

In the second count the facts, after certain preliminary allegations, are stated to be that: "defendants did wrongfully and maliciously compose, print and publish and cause to be composed, printed and published, of and concerning plaintiff, together with his photograph, the following false, defamatory, scandalous and malicious libel meaning thereby, and so understood by persons who saw the same, to impute to plaintiff a falsehood and attributing to plaintiff in said publication, a statement which was false and malicious, to-wit: 'Papa is going

Picture of Plaintiff.

to buy mamma an Elgin watch for a present, and some one (I musn't tell who) is going to buy my big sister a diamond ring. So don't you think you ought to buy me something? The payments are so easy, you'll never miss the money if you get it of Harris-Goar Co., 1207 Grand Ave., Kansas City, Mo., Gifts for Everybody, Everywhere in their Free Catalogue.' "

The upshot of defendants' position in support of their demurrer to the first count, is that there is no right of privacy of which the law will take notice; or, stated differently, their argument is that the law does not afford redress for an invasion by one person of another's privacy unless it is accompanied by some injury to his property or interference therewith; and that the mere printing and publishing one's picture does not and cannot affect his property. The cases principally relied upon by defendants are those of *Roberson v. Rochester Folding Box Co.*, 171 N. Y. 538; *Henry v. Cherry & Webb*, ——— R. I. ——— (73 Atl. 97.); and *Atkinson v. Doherty*, 121 Mich. 372; in the first of which, in the course of an interesting opinion concurred in by a majority of the court, is found a course of reasoning which denies that a right of privacy exists which can be protected by a court of equity. That case was a bill in equity to enjoin a mercantile firm from publishing a young woman's picture as an attraction to an accompanying advertisement of a certain brand of flour. The court in denying the right of equity to protect a person thus embarrassed, shows its unfriendliness to the claim in the following language: [“The so-called right of privacy is, as the phrase suggests, founded upon the claim that a man has the right to pass through this world, if he wills, without having his picture published, his business enterprises discussed, his successful experiments written up for the benefit of others, or his eccentricities commented upon either in handbills, circulars, catalogues, periodicals or newspapers, and, necessarily, that the things which may not be written and published of him must not be spoken of him by his neighbors, whether the comment be favorable or otherwise.”]

The conclusion of the court is based much upon the statement that the case there presented was without precedent, and, while admitting that equity, in the beginning and early part of its administration, was made

up of growth, case by case, which was without precedent, being based merely upon the conscience of the chancellor, yet there came a time when its growth ceased and what was formerly the personal conscience of the chancellor, became a "juridical conscience", which would only permit relief to be administered in cases where it had been administered before, save in those instances "where there can be found a clear and unequivocal principle of the common law which either directly or mediately governs it, or which by analogy or parity of reasoning ought to govern it." With such consideration as a guiding thought, the court refused relief because there was no precedent for it and it did not appear to be within any recognized legal principle. This view is approved in *Henry v. Cherry & Webb*, which was an action at law in the nature of trespass for damages for an invasion of the right of privacy by using and publishing the plaintiff's picture as an advertisement in aid of the sale of merchandise. In such respect it was like *Roberson v. Rochester Folding Box Co.* Though one was an application in equity for restraint and the other was for damages at law, yet as each, by similar reasoning, denied that there was any such right, both denied any remedy.

The remaining case (*Atkinson v. Doherty & Co.*) was where after the death of John Atkinson, a celebrated lawyer, the defendants, who were manufacturers of cigars, named a brand of their make the "John Atkinson Cigar," and placed the name, together with his picture, as a label on cigar boxes. His widow sought to restrain such acts by injunction. Her right was denied; and again the reasoning in *Roberson v. Rochester Folding Box Co.* was approved. But it will be observed that while the *Roberson* case involved the right of privacy of the plaintiff's own picture, the *Atkinson* case, like that of *Schuyler v. Curtis*, 147 N. Y. 434, sought to protect the right of privacy to the name of a deceased relative,

a case which did not call for much that was said in the course of the opinion, concerning the general right of privacy, except by way of argument or illustration; and what was said beyond the right of privacy which may be claimed by relatives of a deceased, must be regarded as *dictum*. The point of agreement in these cases is that no relief can be had by way of protecting a right of privacy, for the reason that it was not a right of property and did not fall within any legal principle.

But courts which refuse assent to those decisions assert that it is a right of property and that there is such legal principle, old and well recognized; though they concede the case is new in its facts. The main ground for division of opinion in these courts is at last found to be based upon those conflicting assertions. So therefore it appears that if it can be established that a person has a property right in his picture, those who now deny the existence of a legal right of privacy would freely concede a remedy to restrain its invasion, for all agree that equity will forbid an interference with one's right of property.

✓ Property is not necessarily a taxable thing any more than it is always a tangible thing. It may consist of things incorporeal, and things incorporeal may consist of rights common in every man. One is not compelled to show that he used, or intended to use, any right which he has in order to determine whether it is a valuable right of which he cannot be deprived and in which the law will protect him. The privilege and capacity to exercise a right, though unexercised, is a thing of value—is property—of which one cannot be despoiled. If a man has a right to his own image as made to appear by his picture, it cannot be appropriated by another against his consent. It must strike the most obtuse that a claim of exclusive right to one's picture is a just claim. Judge GRAY, in his dissenting opinion in *Roberson v. Rochester Folding Box Co.*, *supra*, said, at page 563 of the report, that: "The proposition is,

to me, an inconceivable one that these defendants may, unauthorizedly, use the likeness of this young woman upon their advertisement, as a method of attracting widespread public attention to their wares, and that she must submit to the mortifying notoriety, without right to invoke the exercise of the preventive power of a court of equity."

One may have peculiarity of appearance, and if it is to be made a matter of merchandise, why should it not be for his benefit? It is a right which he may wish to exercise for his *own* profit and why may he not restrain another who is using it for gain? If there is value in it, sufficient to excite the cupidity of another, why is it not the property of him who gives it the value and from whom the value springs? L

It may be admitted that the right of privacy is an intangible right; but so are numerous others which no one would think of denying to be legal rights which would be protected by the courts. It is spoken of as a new right, when, in fact, it is an old right with a new name. Life, liberty and the pursuit of happiness, are rights of all men. The right to life includes the pursuit of happiness, for it is well said that the right to life includes the right to enjoy life. Every one has the privilege of following that mode of life, if it will not interfere with others, which will bring to him the most contentment and happiness. He may adopt that of privacy, or, if he likes, of entire seclusion. The face of the majority opinion in *Roberson v. Rochester Folding Box Co.*, supra, while denominating the right of privacy as "a phrase" and "a so-called right," yet concedes that "it is a something which to disturb is an "impertinence". The court recognizes the right, but, as has been already said, not considering it a property right, refused it the protection of the restraining power of a court of equity; and thereby confined the beneficent power of equity within too narrow bounds—bounds so limited as will permit the doing of acts which shock the moral sense.

✓ We therefore conclude that one has an exclusive right to his picture, on the score of its being a property right of material profit. We also consider it to be a property right of value in that it is one of the modes of securing to a person the enjoyment of life and the exercise of liberty; and that novelty of the claim is no objection to relief. If this right is, in either respect, invaded, he may have his remedy, either by restraint in equity, or damages in an action at law. If there are special damages, they may be stated and recovered; but such character of damages is not necessary to the action, since general damages may be recovered without a showing of specific loss; and if the element of malice appears, as that term is known to the law, exemplary damages may be recovered.

It ought, however, to be added that though a picture is property, its owner, of course, may consent to its being used by others. This consent may be express, or it may be shown by acts which would be inconsistent with the claim of exclusive use, as if one should become a man engaged in public affairs, or who by a course of conduct, has excited public interest. And it ought also to be understood that the right of privacy does not extend so far as to subvert those rights which spring from social conditions, including business relations. By becoming a member of society one surrenders those natural rights which are incompatible with social conditions. In the nature of things, man in the social organization must be referred to and spoken of by others, and this may be done freely so long as it is free from slander. But the difference between that right and a claim to take another's picture against his consent, or to make merchandise of it, or to exhibit it, is too wide for hesitation in condemning the act and granting proper relief.

The foregoing views find ample support in thoroughly considered cases decided in recent years. [Pavesich v. New Eng. Life Ins. Co., 122 Ga. 190; Vander-

bilt v. Mitchell, 71 N. J. Eq. 632; Edison v. Edison Mfg. Co., 73 N. J. Eq. 136; Foster-Milburn Co. v. Chinn, 134 Ky. 424.] These cases are supported by the dissenting opinion of Judge Gray, writing for the minority of the court, in Roberson v. Rochester Folding Box Co., supra. And we think the principle they announce is practically conceded in Schuyler v. Curtis, 147 N. Y. 434, hereinbefore cited. Several of these cases make acknowledgment to a very able article in 4 Harvard Law Review, 193.

In the Schuyler case a near relative of the deceased, Mrs. Schuyler, sought to enjoin admirers of her many virtues and good deeds from placing her statue in a public place. It was held that relief could not be had on the ground of the deceased's right of privacy, as that right necessarily died with her. And that so long as no aspersion was intended to be cast upon the dead; so long as the dead were intended to be honored in appropriate manner and not slurred or defamed in such way as to outrage the feelings and sensibilities of surviving relatives, there could be no cause of complaint by them. That the alleged injury, in that case, to the sensibility of relatives was fanciful rather than real, and it was therefore not a subject for interference by the courts.

We will now consider whether a cause of action for libel is stated in the second count. Our statute (sec. 4818, R. S. 1909) declares a libel upon a person to be a thing "made public by any printing, writing, sign, picture, representation or effigy tending to provoke him to wrath, or expose him to public hatred, contempt or ridicule" The printed matter set forth in the petition is the utterance of falsehoods, of a character tending to incite ridicule.

It was argued that the printed matter published consisted of purported utterances of plaintiff which were falsehoods and that to charge one in writing with being a falsifier was libelous *per se*. We are not inclin-

ed to base our decision on that ground, since we believe the statement purporting to have been made by plaintiff was palpably not intended to be understood, and would not be taken to be a false statement of fact, but rather as an imaginary statement attributed to him by defendants for purposes of advertisement of their goods.

But it seems to us clear that considering the publication of the picture and the printed matter, as a whole, it would expose plaintiff to ridicule and contempt unless his age (to which we will presently refer) would exempt him. It is a public statement of what plaintiff had said about the private affairs of his father in relation to a present for his mother, and is a reference to the private social affairs of his sister. Connecting these statements with his picture and using them as an advertising aid to business was necessarily bound to cause him to undergo the vexation and humiliation of ridicule though it was not believed he had really made the statements. It does not require any imagination to realize what a suggestive handle it would give to the teasing propensities of his fellows, to be used by them without stint and without regard to his distress. What right had these defendants to thus wrong him? It would be a matter of regret if the law did not afford him a remedy and such an one as would probably prevent repetition. The extreme to which Judge Parker went on the right of privacy in *Roberson v. Rochester Folding Box Co.* did not lead him to say that a party was altogether without remedy. At pages 556 and 557 of the report he concedes that libel could be maintained.

But we are not left to a mere concession. The case of *Pavesich v. New Eng. Life Ins. Co.*, supra, like that at bar, was instituted by petition in two counts, one for damages for an invasion of the right of privacy by publishing the plaintiff's picture in connection with an advertisement wherein he was said to have uttered language in advancement of the business advertised, and the other for libel. The opinion of Justice COBB is not

only an able and exhaustive consideration of the remedy in equity for restraint and at law in damages, for an invasion of the right of privacy, but it includes a distinct and separate affirmation of the right to maintain libel; and that in a case of the kind we have now before us the matter was such that if found by a jury to be untrue, would have been libelous *per se* and no special damages need be alleged. So it was determined by the Supreme Court of the United States, that the publication of a woman's picture in connection with an advertisement of whiskey was a libel which might work serious harm to her standing with some portions of the community. [Peck v. Tribune Co., 214 U. S. 185, overruling the same case in 154 Fed. Rep. 330.]

The plaintiff is an infant only five years old, which fact brings a subject into the case deserving serious consideration. Can an infant be slandered or libeled? The question is easily answered in the affirmative, yet the answer involves the further consideration whether it should not be qualified by way of exception. It seems well settled that an infant is liable for his torts, among which are libel and slander. [Fears v. Riley, 148 Mo. 49; Jennings v. Rundall, 8 T. R. 335; Starkie on Slander, sec. 347.]

But that statement cannot be accepted broadly. For malice and evil intent are necessary ingredients in these torts and therefore sometimes the age of the infant may become of the highest importance in determining his liability. If he be of such immature and tender years that he cannot form malice or entertain conscious evil intention, he cannot be guilty of either libel or slander. It would be a ridiculous statement to say that a prattling child, two or three years old, could slander or libel another. It would be almost, if not quite, as ridiculous to say that an infant twenty years old could not entertain malice so as to be guilty of these wrongs. Where, then, is the line to be drawn? We think the rule in criminal cases applies, for they and libel and

slander have malice for a common ingredient. *Doli incapax* finds place in the consideration of the question. An infant is not liable to an action of slander "until he is *doli capax* 'capable of mischief'—which, presumptively is not until he is fourteen years of age." [Tyler on Infancy, sec. 127; Newell on Slander and Libel, 370; Odgers Libel and Slander (star page) 353.] The rule at common law, in force in this state (State v. Tice, 90 Mo. 112) is that a child under seven years of age is *doli incapax*—incapable of committing a crime; and between that age and fourteen he may or may not be; over fourteen he is as an adult. And so if he is under seven he should be considered incapable of libel or slander. These wrongs are indictable in this, and many other countries, as state offenses, and it would be an inconsistency to be avoided, if possible, to say, as a matter of law, in one forum, that the child could be capable of the act, and in the other that he could not.

It is not inconsistent with, nor an objection to this view that a child of tender years may commit a trespass and be civilly liable for damages. *Doli capax* cuts no figure in that instance; for a trespass does not necessarily imply malice, or evil intention. So a boy under seven years, was held liable for breaking down shrubbery and destroying flowers. [Hutching v. Engle, 17 Wis. 237.] And Judge COWEN, in Hartfield v. Roper, 21 Wend. l. c. 621, cites a case where an infant only four years old was stated to be liable in trespass. But in such extreme instances it is conceded that punitive damages could not be had; this, on the ground that wantonness or malice could not be imputed.

Though in some degree allied to the point in discussion, it is not necessary for us to say at what tender age, arbitrarily fixed, an infant would not be liable for fraud, but manifestly there is a period of immaturity when he could not be guilty of wrongful deception. Clearly he should be of such years of discretion that such a wrong could be fairly charged to him. In Watts

v. Cresswell, 3 Eq. Cas. Abr. 515 (9 Vin. Abr. 415) it was said that "if an infant is old enough to contrive and carry out a fraud, he ought to make satisfaction for it." Which is but another mode of saying that unless he has sufficient years of discretion to invent and perpetrate a fraud, he could not be held to have committed one.

Though, as thus shown, a child of tender years be incapable of uttering a slander or publishing a libel, it does not follow that he may not be slandered or libeled. The two positions are not dependable upon one another. In some instances and in some stages of infancy, opprobrium could not affect a child. Much would depend upon the nature of the offensive imputation. If an infant at the breast of his mother was charged with being a thief, it probably would not be slander, since it is not possible for him to commit larceny, either in point of fact or point of law. But if such infant should be charged with being afflicted with a loathsome and permanent disease, or with a private and humiliating physical malformation, these are charges which could be true and furthermore, they are species of defamation which would grow and the harmful effect of which would increase with the passing of time, and we can see no reason why it would not be slander. It has been decided that the fact that an infant is too young for criminal responsibility will not bar him of his action against his traducer. [Stewart v. Howe, 17 Ill. 71.] By the statute of Illinois the common law criminal irresponsibility for crime was raised from seven to ten years in cases of larceny, and a girl of age between nine and ten was charged with being "a smart little thief." The defendant sought to escape liability on the ground that she could not commit the crime of theft. The judge delivering the opinion became heated and indignant and characterized the defendant as a "reputational infanticide", and said that he "would sooner

see the action abolished than to read out infancy from the pale of its protection."

The foregoing is sufficient for an understanding of our views in relation to plaintiff's liability to be wronged, or, if it may be so expressed, his capacity to be injured. In our opinion, notwithstanding he was but five years old, he was liable to the ridicule of his fellows. His susceptibility to vexation and humiliation was at hand and his appreciation of the outrage committed by defendants would grow in greater proportion than would the failure of memory in his associates.

It is well enough to add that a trial may disclose that plaintiff was less than five years old; and so much less as not to be the subject of ridicule, or contempt, or public hatred by any appreciable number of the community (*Peck v. Tribune Co.*, *supra.*). If so, then, under the views we have expressed, he was not libelled. It may be that his years and his intelligence were such that to be subject of ridicule, contempt or hatred would be a matter over which persons would differ, in which event the question could not be withdrawn from a jury, but would be for their consideration as to the law and the fact, as is proper in libel.

The result of the foregoing consideration is to reverse the judgment and remand the cause for trial. All concur.

MISSOURI, KANSAS and TEXAS RAILWAY COMPANY, Appellant, v. MELVIN H. MORRIS, Respondent.

Kansas City Court of Appeals, February 13, 1911.

1. **ATTACHMENT: Judgments: Order of Publication.** Where, the order of publication against the defendant does not give his christian name, the justive acquires no jurisdiction to render a judgment sustaining the attachment.
2. **APPELLATE PRACTICE: Garnishments: Defense of Void Judgment.** Where, after such a judgment against a non-resident defendant, a further judgment is rendered by default against a garnishee which failed to appear after plaintiff's denial of its answer to plaintiff's interrogatories, the garnishee is not estopped from setting up the fact on appeal that the judgment rendered against it is void.

Appeal from Pettis Circuit Court.—*Hon. Louis Hoffman*, Judge.

REVERSED AND REMANDED.

Montgomery & Montgomery for appellant

W. D. Steele for respondent.

BROADDUS, P. J.—This is an action of replevin to recover certain lumber belonging to plaintiff, which had been sold under an execution issued against the plaintiff by a justice of the peace, upon a judgment which the defendant had obtained against plaintiff as garnishee.

The defendant in May, 1904, brought a suit by attachment before a justice of the peace, against one W. E. Seifer, upon a promissory note. The ground relied on in the attachment suit was that Seifer was a non-resident of the state.

The appellant herein was garnisheed and thus made a party to the proceedings.

On April, 28, 1905, an order of publication was made for the defendant under the name of W. E. Seifer to appear and answer to the cause on May 20, 1905. The defendant not appearing at that date judgment was rendered sustaining the attachment.

A summons was issued for the garnishee to appear on April 28, 1905, to answer interrogations, upon which the constable made the following return: "I hereby certify that I delivered a true copy of the within summons to J. F. McDougall, agent of the Missouri, Kansas & Texas Railway Company, at Sedalia, Missouri, on the 17th day of April, 1905, in the city of Sedalia, county of Pettis, and State of Missouri."

On April 21st, the garnishee, the appellant herein, submitted its answer to the interrogations filed in which it denied all indebtedness to Seifer, or that it had in its possession any money or property belonging to him; and further, that it was not subject to garnishment for the demand under the provision of section 3447, Revised Statutes 1899.

On April 28th, Morris filed his denial of the garnishee's answer. On the following day judgment was rendered against the garnishee by default. On this judgment the execution was issued under which the constable seized the lumber, the property replevined.

The judgment was for defendant and plaintiff appealed. We have stated enough of the facts for the purpose of the case.

The appellant's principle contention is that the justice under the service by publication acquired no jurisdiction to render judgment sustaining the attachment, for the reason; that, the order of publication did not give the Christian name of the defendant; but against him as W. E. Seifer. It is held: "Where in an action against a non-resident, the order of publication against the defendant gave his name as Q. R. No-

Dooley v. Ryan.

land instead of Quinces R. Noland, and there was no personal appearance under the order of publication, the court acquired no jurisdiction." [Skelton v. Sackett, 91 Mo. 377.] And to the same effect is the holding in Turner v. Gregory, 151 Mo. 100. And the rule is also recognized in Vincent v. Means, 184 Mo. 327.

But defendant insists that the plaintiff as garnishee by its failure to appear and defend the garnishment is estopped and cannot at this time claim that the judgment rendered against it is void, and relies to support its position upon Fletcher v. Wear, 81 Mo. 524. But the effect of the holding does not go to sustain defendant's position, but on the contrary to overturn it, and sustain the theory of plaintiff.

Other questions are raised by the appellant, but as the record shows in any light it may be considered, that the judgment sustaining the attachment is void for the reason stated, and further discussion of the case would not be profitable. The cause is reversed and remanded. All concur.

In the Matter of the Claim of S. W. DOOLEY, Respondent, v. Estate of J. J. RYAN, Deceased, Nellie Welsh et al., Administratrices, Appellants.

Kansas City Court of Appeals, January 16, 1911.

1. **EXECUTORS AND ADMINISTRATORS:** Appellate Practice: **Validity of Probate Court's Judgments.** The administratrices objected in the probate court to the allowance of an order to pay a demand previously allowed by the court, and assigned to the sixth class, the only ground of their objection being "that said demand has already been paid in full." From a verdict in favor of the estate, the claimant appealed to the circuit court, where the court, without the aid of a jury, rendered judgment in claimant's favor, and ordered the probate court to direct the administratrices to pay claimant out of the

assets so much of his claim as it may be entitled to under the law. *Held*, on appeal from this judgment, that the objections to the validity of the judgment of the probate court, allowing and classifying the demand, are not within the scope of the present proceeding.

2. ———: ———. Where the administratrices failed to prosecute an appeal from the judgment of the probate court, allowing and classifying a demand, the validity of that judgment can not be questioned in the circuit court on an appeal from the verdict of a jury in the probate court where the only issue tendered by the administratrices was payment.
3. ———: Judgment: **Erroneous Recital.** Although the judgment of the circuit court erroneously recited that the demand was assigned by the probate court to the fifth (instead of the sixth) class, where such a judgment does not purport to change the classification, the error should be disregarded as a mere inadvertence.

Appeal from Bates Circuit Court.—*Hon. C. A. Denton*,
Judge.

AFFIRMED.

Thos. J. Smith for appellants.

S. W. Dooley for respondent.

JOHNSON, J.—This proceeding was commenced in the probate court of Bates county by a motion filed April 7, 1909, for an order on the administratrices of J. J. Ryan deceased, to pay a demand against the estate of one hundred dollars and interest previously allowed by the court and assigned to the sixth class.

Notice of the motion was not served on the administratrices but service was acknowledged by their attorney who appeared and objected to the allowance of the order prayed, for the reason "that said demand has already been paid in full." The issue thus raised was tried before a jury and a verdict was returned for the estate on the express ground that the demand had been paid in full. The claimant appealed to the cir-

cuit court where a trial of the cause without the aid of a jury resulted in the following judgment:

"Now at this day come the parties and the court having previously heard evidence herein and fully considered the same, doth find that on the 12th day of April, 1909, during the regular February term, 1909, of the probate court of this county, claimant herein, S. W. Dooley, did file in said court for allowances and classification and judgment rendered by this court on the 12th day of August 1907 in his favor for the sum of \$500 against the estate of J. J. Ryan, deceased, also did file a motion for an order on the administratrices for distribution of the assets of said estate and the payment of said claim and said court entered judgment classifying said claim and making it a fifth class claim against said estate; that said court rendered judgment against the claimant on his motion for an order of distribution and payment of his said claim which said claimant has appealed to this court. The court doth further find that said Dooley has been paid \$400 on said sum of \$500 and that there is a balance due on said judgment of \$100. The court doth further find that at the time said motion was filed in the probate court there was \$1025 in the hands of the administratrices and that there has come into their hands additional assets belonging to said estate, subject to distribution on this and other claims probated against said estate.

"Wherefore the court doth render judgment in favor of said S. W. Dooley and against the estate of J. J. Ryan, deceased, for said balance of one hundred dollars and interest to date of \$14.75, aggregating \$114.75, together with his costs in this behalf expended.

"It is further ordered that the probate court direct the administratrices to pay said Dooley out of the assets of said estate subject thereto, so much of his claim as it may be entitled to under the law."

The administratrices appealed from this judgment and assail it here on a number of grounds.

The points argued by counsel for the estate against the validity of the judgment of the probate court allowing and classifying the demand will not be considered on this appeal for the reason that such issues are not within the scope of the present proceeding which presupposes that a valid judgment was rendered and seeks an order of distribution to aid in the collection of the remainder of that judgment alleged to be due. The only issue tendered by the administratrices was that of payment. The validity of the judgment was not questioned nor could it have been questioned in the circuit court since the jurisdiction of that tribunal was derivative and the administratrices failed to prosecute an appeal from the judgment of the probate court allowing and classifying the demand.

The circuit court tried the only issues before it, i. e., that of payment, and, finding that issue for the claimant, properly rendered judgment against the estate for the amount still due the claimant. Though the judgment erroneously recites that the demand was assigned by the probate court to the fifth class, it does not purport to change the classification and the error should be disregarded as a mere inadvertence. The judgment does not purport to order the administratrices to pay the demand but sends it back to the probate court as an adjudicated claim entitled to participate in the distribution of the funds of the estate properly applicable to the payment of demands of its class. The question of whether or not this demand already has received its proportional share of such funds may properly arise in the probate court on the making of an order of distribution.

The judgment of the circuit court properly disposed of the case and, accordingly, is affirmed. All concur.

**SAMUEL BUCKLEW, Respondent, v. ROBERT B
PYRON et al., Appellants.****Kansas City Court of Appeals, February 13, 1911.**

1. **CORPORATIONS: Stock: Sale: Consideration.** A corporation was organized in Texas by three men. The capital stock was \$10,000, divided into 100 shares, each of \$100 par value. Only \$500 was paid in in cash. The stock was issued to the three incorporators in about equal amounts and was, by their order, marked 'paid up and non-assessable.' Afterwards one of them bought one of the other's stock; and after that he and the third one entered into a written contract whereby the third one also sold his stock, for which he gave his promissory notes. In a suit on the notes it was held that the transfer of the stock was a sufficient consideration for the notes.
2. ———: ———: **Stockholders, Inter se: Creditors.** Though the law declares that all issue of corporate stock is void unless it is paid up in full, yet, where the contest is between the organizing stockholders who issued the stock without its being paid up, the stock is not void. But otherwise as to creditors or non-consenting stockholders.
3. ———: ———: **Notes for Purchase Money: Consideration.** If stock is issued without being paid up and notes are given by one stockholder to another for stock, in order that the purchaser may have full control of the corporation, which is a going concern, and he thereby becomes possessed of all the stock and runs and manages the corporation, receiving all the profits of the business, he will not be allowed to say the sale was void and afforded no consideration for notes given for the purchase money.

**Appeal from Jackson Circuit Court.—Hon. A. F. Smith,
Special Judge.**

AFFIRMED.

Botsford, Deatherage & Creason for appellant.

(1) This suit of plaintiff Bucklew against defendant Pyron to recover on the counts of the amended peti-

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tion from No. 2 to No. 9, inclusive, based on the \$500 notes, is an attempt to recover something for nothing. Those notes are wholly without consideration and are therefore void. There is no better defense in the law than failure of consideration. The defense of failure of consideration is based upon and is laid deeply in the jurisprudence of equity and good conscience. Besides, the agreement between the promoters and incorporators of the land company, by which the stock was to be issued without the payment therefor of either any money, property or services, being founded upon a consideration which was and is illegal, is void as between the parties and their privies, and, being void, neither a court of law or equity will entertain a suit brought in relation to that contract, but will leave the parties as it finds them. 6 Am. and Eng. Ency. Law (2 Ed.), pp. 757, 758; Campbell v. Joies, 2 Tex. Civ. App. 263, 21 S. W. 723. The contract between Oliver, Bucklew and Pyron was wholly without consideration, being illegal and void, such stock could not constitute a sufficient consideration for a promise by Pyron to Bucklew. 15 Am. and Eng. Ency. Law, pp. 932, 936, 937; Rue v. Railroad, 74 Texas 474, 8 S. W. 533. It is presumed that the laws of Texas, rendering void all fictitious issues of stock, are the same as those of Missouri on the same subject. Kollock v. Emmet, 43 Mo. App. 566; Waite v. Bartlett, 53 Mo. App. 378; Hard. & Mfg. Co. v. Lang, 54 Mo. App. 147; Hurley v. Railroad, 57 Mo. App. 675; Clark v. Barnes, 58 Mo. App. 667; Barhydt v. Alexander, 59 Mo. App. 188. (2) The stock of plaintiff Bucklew transferred by him to defendant Pyron and for which the \$500 notes in suit were given, having been issued under an agreement between said Bucklew, Pyron and Oliver that said stock was to be issued as fully paid up and non-assessable, without any payment whatever in money, property or services therefor, was and is fictitious, both under the Constitution and laws of Missouri and Texas, and was therefore void, and said stock there-

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fore could not be the basis of said \$500 notes given therefor, and said contract for the sale of said stock by Bucklew and Pyron and said \$500 notes given therefor and sued on herein, being illegal and without consideration and unexecuted and still executory, it results that Bucklew is not entitled to recover thereon, and that the instruction of the trial court to find for Bucklew as to those notes, which was excepted to by Pyron, was erroneous; and for that reason the verdict and judgment on those \$500 notes should be reversed. *Rogers v. Gross*, 67 Minn. 224, 69 N. W. 894; *Coler v. Ry. & Power Co.*, 65 N. J. Eq. 347, 54 Atl. 413; *Tschumi v. Hills*, 6 Kan. App. 549; *Scoville v. Thayer*, 105 U. S. 143; *Railroad v. Dow*, 120 U. S. 287-298; *Hallett v. N. E. Grate Co.*, 105 Fed. Rep. 217; s. c., 119 Fed. Rep. 873, 56 C. C. A. 403; *Altenberg v. Grant*, 85 Fed. Rep. 345, 29 C. C. A. 185.

J. C. Rosenberger and Kersey Coates Reed for respondent.

(1) Although all of the transactions in question took place in the State of Texas and were to be performed there, we agree with the appellants that the applicatory and governing law to be applied to the questions raised by appellants in their brief is the law of Missouri, being the law of the forum. The defendants did not plead or prove any of the constitutional provisions, statutes or decisions of the State of Texas bearing on the questions raised in their brief. The general rule as laid down in this state is that where the condition of the law of another state becomes material and no evidence has been offered concerning it, our courts will presume that the general principles of the common law prevail here, but that no such presumption obtains respecting the constitutional or statutory law of the foreign state. *Morrissey v. Wiggins Ferry Co.*, 47 Mo. 525; *McDonald v. Banker's Life*, 154 Mo. 628;

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Houghtaling v. Ball, 19 Mo. 86. (2) But the State of Texas falls within an exception to this general rule, it being held that the presumption that the common law prevails in another state relates only to those states which were once parts of the English possessions and not to Texas, which was part of the Spanish possessions, and that as to the State of Texas if no evidence is introduced, the law of the forum must govern. Flato v. Mulhall, 72 Mo. 525. And the court in the case last cited applied Missouri statutes to a Texas contract, there being no plea or proof of the Texas statutes. Where no rights of creditors are involved as between a corporation and its shareholders, whatever is agreed to be payment for stock, is payment, and neither the company nor a participating stockholder will afterward be heard to say that the stock was not fully paid for. This is the law in Missouri as well as elsewhere. 10 Cyc. 466, 469; Skrainka v. Allen, 76 Mo. 384; Hill v. Coal Co., 124 Mo. 166; Standard Machine Co. v. Hills. 68 Mo. App. 249; Roll v. Milling Co., 52 Mo. App. 60; Meyer v. Milling Co., 193 Mo. 192, 196; Woolfolk v. January, 131 Mo. 634; Vogeler v. Punch, 205 Mo. 571; Scovil v. Thayer, 105 U. S. 143, 26 L. Ed. 968; Krohn v. Williamson, 62 Fed. 875; Callanan v. Windson, 78 Iowa 197, 42 N. W. 653; Barr v. Railroad, 57 Fed. 375; McCracken v. Railroad, 57 Fed. 375, 52 Fed. 726. (3) Independently of the validity of plaintiff's stock the benefit and advantage derived by Pyron in its acquisition and in thereby putting himself in sole control of the company and its assets was abundant consideration for the transfer of the stock and the notes given in payment therefore. Sec. 2774, R. S. 1909; 9 Cyc. 311; Lindell v. Rokes, 60 Mo. 249; Pitt v. Gentle, 49 Mo. 74; Carr v. Card, 34 Mo. 513; Hout v. Frisbee, 66 Mo. App. 16. (4) Even if there were merit in the contention of appellants that the stock was issued illegally to plaintiff, and there is none, there was nothing illegal in the contract made nine months afterward by Pyron

for the purchase of plaintiff's stock. The series of eight notes arose out of the contract of sale, not out of the issuance by the company of its stock. The contract for the sale of the stock was made long after the issuance of the stock had been fully consummated, was for a lawful object and had no relation to the manner the stock was issued or paid for. 15 Am. and Eng. Ency. Law, 992; *Hutchinson v. Dornin*, 23 Mo. App. 575; *Curry v. La Fon*, 133 Mo. App. 163.

ELLISON, J.—Plaintiff's action is based on a petition containing nine counts; each for the recovery of judgment on a promissory note executed by defendants; in the first of these counts the note is for \$1000, and in each of the remaining eight the note is for \$500; the whole aggregating \$5000. The defendants answered separately. Defendant Pyron's answer to the first count was a general denial; that the note was given without consideration; that it had been fully paid; and that it was given for plaintiff's accommodation only. His answer to each of the other counts was that the notes were given without consideration; that they each had been fully paid, and that the other defendant, the "Bob Pyron Land Company," had been organized in the State of Texas as a corporation dealing in the sale of lands, with a capital stock of \$10,000, divided into one hundred shares of \$100 each, that defendant, one W. E. Oliver and plaintiff were the incorporators of such corporation, with Oliver and plaintiff each subscribing for thirty-three shares and defendant for the remaining thirty-four shares; that \$500 was actually paid in cash, on such subscriptions. That Oliver afterwards "contributed on his stock \$1283," and defendant "also contributed and paid into the treasury of said company on his stock large sums of money." That plaintiff was called upon to pay the balance upon his subscription and that he paid in response the sum of \$1000. But before making this payment he asked Oliver and the de-

defendants to give and endorse the note to him of \$1000 which he has sued upon in the first count, as an accommodation note for him to use in borrowing the money with which to pay the \$1000 on his stock subscription, and that this was done, solely to favor and accommodate him. That some time after the organization of the corporation defendant bought Oliver's stock, paying him therefor \$1283, the amount he had paid into the treasury on it, making defendant's total stock to be sixty-seven shares. That shortly afterwards, on the 28th of November, 1906, plaintiff and defendant entered into a written contract whereby defendant bought of plaintiff his thirty-three shares of stock for \$5000, of which \$500 was paid in cash and a note for \$500 due the 1st of January, 1907, and eight notes, each for a like amount, one due the first of each month thereafter. These notes were secured by the certificates of stock being endorsed by plaintiff and deposited in bank and also by an assignment of certain commissions due defendant amounting to \$2000. That the cash was paid and the first note falling due was also paid by defendant. But the others are the ones sued upon in this action. It is then pleaded that at the time of making this contract, it was understood and agreed that the \$5000 thus agreed to be paid for the stock, included the note for \$1000 sued on in the first count, and it was to be cancelled and delivered to defendant. But that plaintiff has refused to so cancel and deliver it and in consequence "the consideration for all of said notes in the petition and the \$500 cash paid and the consideration for the \$500 note which defendant paid, has failed; in consequence of which, defendant has the right to elect and does elect to rescind the contract aforesaid." Wherefore it is alleged that plaintiff has become liable to pay him back the \$1000 so paid, and for which judgment is asked as a counterclaim, and that the first note be cancelled.

The separate answer of the land company was, first a general denial except it admitted its incorporation; second, want of consideration for any of the notes sued on; third, payment; fourth, that the note for \$1000 sued on in the first count was given for plaintiff's accommodation, that he might borrow money thereon; fifth, that giving the note by defendant was not within the power of the corporation; sixth, that a certain contract already described in Pyron's separate answer, was made between the parties and that it had been violated by plaintiff and that it had been rescinded, and pleading a counterclaim for \$450 "for money paid to plaintiff;" seventh, the corporation law of the State of Texas is plead and it is alleged that the defendant corporation was formed with plaintiff as one of the original subscribers of stock in the sum of \$3300, on which he had paid \$1250, leaving still unpaid \$2050, for which judgment was asked.

Plaintiff's reply set up estoppel, in that defendant had joined in the organization of the corporation; had participated in the issue of the stock and stamping it paid and non-assessable, and that he was enjoying the benefit of the sale made by plaintiff to him.

The cause was tried by A. F. Smith, Esq., of the Kansas City bar, as special judge. The judgment was for the plaintiff on all of the counts. On the first, it was against both defendants; but on the eight other counts it was against defendant Pyron only.

The foregoing statement, though of some length, is much shorter than that made by the parties. We have omitted much detail which could be of no service in stating the reasons for our conclusions. It appears that a land company corporation was formed, in the State of Texas with a capital stock of \$10,000, divided into one hundred shares of the par value of \$100 each, and that one Oliver, plaintiff and defendant Pyron were the incorporators, the two former taking thirty-three shares each and the latter thirty-four shares. That af-

terwards defendant Pyron bought Oliver's stock, making his holding to be sixty-seven shares; and that afterwards he bought plaintiff's shares. There was evidence tending to prove that there was dealing between plaintiff and defendant Pyron, not necessary to describe in detail, whereby he was indebted to plaintiff by reason of the latter making advancements to him in addition to a loan made for which the note of \$1000, sued on in the first count, was given. After a time, plaintiff having grown restive about the affairs of the corporation, which was managed by Pyron, the latter proposed to buy him out. After some negotiation, it was determined that plaintiff would sell to Pyron his stock and his interest and his unsettled claims against the company, for the sum of \$5000. A written contract was thereupon made whereby plaintiff sold his stock and all his "claim, right, title and interest in and to said company of any kind whatsoever," for \$5000, to be paid by \$500 in cash and nine notes for \$500 each. The cash payment was made and the first note was paid, while the remaining eight and the note for \$1000 are the subject of this action.

The defense to the notes, except the one in the first court, the \$1000, is based on an attempt to investigate and determine the rights of the parties without recognition of the binding force of the written contract between plaintiff and defendant Pyron. That contract is couched in plain and unambiguous language to the effect that for plaintiff's stock and for his advancements to the company, Pyron was to pay him \$5000; of which \$500 was to be in cash and the balance in nine notes, one of which was paid and the others now in controversy. . The trial court properly informed the jury that the contract bound the parties and that there was no defense to the notes. Under the evidence the court could have done no less than this without committing error against the plaintiff. The whole effort to show other matters, contracts and understanding outside of,

in addition to, or contradiction of the contract, was in the face of a fundamental rule governing written contracts.

And the same may be said of Pyron's counterclaim for \$1000, and it was properly disallowed by a peremptory instruction. And the same may be said of the effort to include in the contract the note of \$1000, sued on in the first count, by insisting that it was sold by plaintiff along with the stock. The same also may be said of the counterclaim for \$2050, hereinbefore referred to.

The note last mentioned, as already shown, was claimed by plaintiff to be for borrowed money, and defendant claimed it was merely an accommodation note to enable plaintiff to borrow money. The issue was submitted to the jury and the finding is supported by the evidence.

The counterclaim of the defendant land company of \$450 "for money paid to plaintiff," to which we have already referred, was properly submitted to the jury on evidence which supports the finding.

This brings us to what is the principal defense. Defendants claim that the issuance of stock in the manner this was issued, was contrary to law, against public policy, and therefore void.

It appears to be conceded by the parties that under the laws of both Texas and Missouri all fictitious issues or increase of stock of any corporation are void; and that no stock should be issued except for money paid, labor done, or property actually received. Under the laws of Texas a corporation could be formed with a capital as small as \$10,000, and only one-half of the capital need be subscribed, and only ten per cent of that need to be paid in order to begin business. These parties, it seems, paid \$500. Oliver was made president of the corporation and defendant Pyron secretary, and they as such officers issued to themselves and to plaintiff as the original stockholders these respective cer-

tificates of stock, as already mentioned. Across the face of these certificates were the words "Full paid and non-assessable." The most that can be said for the stock issued in this case, is that if it were not issued without anything being paid, the payment made was far less than its face value. The question is, shall it be considered valid stock between the parties to this controversy?

It will help out an understanding of our conclusion by also stating what is not the question. It is not a question between stockholders and creditors, nor between creditors and the corporation. It is not a question between the corporation and non-consenting stockholders. It is not a question involving an unexecuted contract as to the stock. It is a question between stockholders concerning an executed transaction, in which *all* agreed and *all* took part in doing what one of them now seeks to avoid the consequence of doing. The law is that as between the consenting stockholders, if an arrangement is made whereby stock is issued for less than its value, one cannot take advantage of that lack of compliance with the directions of the law, to the disadvantage of the other. [Skrainka v. Allen, 76 Mo. 384, 391; Hill v. Coal Co., 124 Mo. 153, 166; Woolfolk v. January, 131 Mo. 620, 634; Meyer v. Mining & Milling Co., 192 Mo. 162, 191, 196; Vogeler v. Punch, 205 Mo. 558, 571; Scovill v. Thayer, 105 U. S. 143; Standard M. M. Co. v. Hills, 68 Mo. App. 249; Roll v. Smelting & Mining Co., 52 Mo. App. 60.]

We cannot undertake to review a long list of authorities cited by defendants and content ourselves with the statement that far the greater part of them were contests over questions which we have said are not in this case. In Memphis & L. R. Ry. Co. v. Dow, 120 U. S. 287, 298, there occurs this statement: "The prohibition against the issuing of stock or bonds, except for money or property actually received or labor done, and against the fictitious increase of stock or indebtedness,

was intended to protect stockholders against spoliation, and to guard the public against securities that were absolutely worthless. One of the mischiefs sought to be remedied is the flooding of the market with stock and bonds that do not represent anything whatever of substantial value."

It will be observed that nothing is said concerning the protection of stockholders against their own acts which have been accomplished.

But it seems clear to us that the defendants are, upon other reasons, without ground upon which to base their claim of total failure of consideration of the notes. The written contract transferred not only the stock, but all interest in the corporation or claims against it. Plaintiff retired from the corporation and left it solely in defendant Pyron's hands. Granting it may have been organized in an illegal way, it was, in point of fact, a going concern, earning money, and defendant was put into possession of all its assets and the possessor and owner of all its earnings which may have been then on hand. He seemed to want to have sole control, to manage with a hand untrammelled by the critical or inquiring or restraining hand of other interests, and he finally entered into an agreement whereby he would pay a certain sum to accomplish that desired end. We see no reason why he should now say there was no consideration, when asked to pay the price.

We think the case well tried, and the judgment for the right party. It is accordingly affirmed. All concur.

MARY E. S. PATTERSON, Respondent, v. SAMUEL L. EVANS, Appellant.**Kansas City Court of Appeals, February 13, 1911.**

1. **LIBEL: Pleading: Meaning of Charge: Instructions.** Where the charge in the petition for libel is that defendant published of a boarding-house keeper that she was "delinquent" and that by such publication it was meant that she was not worthy of credit and was on the black list, it was held that the plaintiff is bound by the meaning attached to the words by the petition and therefore to be error to include in an instruction the issue whether, plaintiff was dishonest.
2. **LIBEL PER SE: Commercial Journal: Credit.** It is libel *per se* to publish in a commercial credit journal, of a boarding-house keeper that she is "delinquent," or is "unworthy of credit."
3. ———: ———: ———: **Damages, General and Special.** In libel *per se*, special damages need not be alleged, as general damages will be presumed, and need not be proved, though they may be.
4. ———: ———: ———: **Cross-Examination: Credit.** Where the plaintiff in an action for libel testified to her loss of credit, it was wrong to exclude cross-examination whether her credit existed at the places she stated, only by reason of her securing the purchase by chattel mortgage.

Appeal from Jackson Circuit Court.—Hon. W. O. Thomas, Judge.

REVERSED AND REMANDED.

Holmes, Holmes & Page and *M. J. Kilroy* for appellant.

Lyon & Lyon for respondent

ELLISON, J.—Plaintiff's action is for libel. She recovered judgment in the circuit court for five hundred dollars actual and one thousand dollars punitive damages.

It appears from the allegations of the petition that plaintiff purchased of defendant a ton of coal which

proved to be worthless for fuel; that she informed defendant of that fact and he refused to allow her to return it, whereupon she notified him that she would not accept the coal and that it was subject to his order, and refused to pay for it. That defendant, after informing plaintiff that he would do so, had her name published in a paper, called "Edgar Merchants Exchange," established and carried on for the purpose of publishing the names of delinquent debtors. The charge is then made in the petition in the following words: "That said Edgar Merchants Exchange was and is a journal published in Iola, Kansas, and in common circulation among the business men in Kansas City, Missouri, and Kansas and all over the country, which journal contains the names of delinquent debtors with the name of the person or firm reporting same, and to report and cause a name to be printed in the delinquent list of said journal means that the person so appearing in said delinquent list is unworthy of credit and such list is commonly known in the business community as the black-list; that the said Edgar Merchants Exchange has printed in it the following: 'Bradstreet and Dun is the Wholesalers' Bureau of Information, Edgar Merchants Exchange is the Retailers' Bureau of Information.' You are, no doubt, aware that the Merchants Exchange is published and revised monthly showing all delinquent debtors in 140 different towns in Kansas, Missouri and the State of Oklahoma, and goes into the hands of over 4000 merchants and doctors monthly.' That the said Edgar Merchants Exchange has also printed on the first page the following instructions above the names of the towns, creditors and debtors: 'Instructions. The number shown before the name is the town number. The number shown between the first and last name is the month in the year the delinquent was listed. The number shown after the name is the merchant's

number. Send out all notices to be due to list in from 10 to 15 days.' ”

“That the said defendant, who is a subscriber to the Edgar Merchants Exchange, and whose name appears on page 21 of the 1908 May publication, maliciously, wantonly and wrongfully, without cause and for the sole purpose of injuring plaintiff's credit and humiliating her and unlawfully forcing her to pay him said unjust claim for said coal and knowing the same to be false, caused to be published of the plaintiff in the 1908 May number of the Edgar Merchants Exchange, on page 25, the following: ‘82 Patterson 9 Mrs. 3129 Bell K. C. Mo. 2552.’ That the number 82, according to the rules of the publication, meant Kansas City, Mo., and the number 2522, according to the rules of the publication, referred to the said defendant whose name appeared opposite that number on page 21 as the subscriber who caused the name of the plaintiff to be published. That the said defendant also caused the plaintiff's name to be put in various numbers prior to the May number, 1908, and in various numbers since up to the filing of this suit.”

At the trial two instructions were given to which defendant excepted. They submitted as one of the issues in the case, whether plaintiff was dishonest, and whether those reading the paper and finding plaintiff's name in the “delinquent list,” would understand that such list “was composed of persons that were dishonest and unworthy of credit.” Defendant objected to these instructions on the ground that they introduced the element of dishonesty of plaintiff when that had not been charged as a part of the matter composing the libel, nor had that meaning been ascribed to it.

We think the objection well taken. The petition charges that plaintiff's name was published in the “delinquent list,” and that to “cause a name to be printed in the delinquent list of said journal means that the person so appearing in said delinquent list is unworthy

of credit, and such list is commonly known in the business community as the black-list." When the printed language which is charged to be libelous is such that it may have different meanings, or is ambiguous, the meaning ascribed to it by the pleading will bind the pleader. Such statement of meaning is a notification to the defendant of what he is charged with and what he must prepare himself to defend. It would violate all rules of pleading, not to say common fairness, to allow the meaning ascribed to the words by the plaintiff himself, to be suddenly changed by the submission of another totally different meaning, so different as to amount to a distinct and independent charge. [Smid v. Bernard, 63 N. Y. Supp. 278; Westbrook v. N. Y. Sun, 65 N. Y. Supp. 399; Wuest v. Brooklyn Citizen, 76 N. Y. Supp. 706.] "He (plaintiff) will not be allowed in the middle of the trial to start a fresh innuendo not in the pleadings; he must abide by the construction put on the words in his statement, or else rely on their natural and obvious import. He cannot during the trial set up a third construction of the words different both from *prima facie* meaning and from that pointed out by the innuendo." [Newell on Slander and Libel, 629; Odgers, Libel and Slander, 102.]

To charge one with being "delinquent" or with being "on the black list" or with being "unworthy of credit," does not imply dishonesty. A man might, by some accident, or misfortune, or mismanagement, become delinquent in payment or unworthy of credit, and thus find his way to a creditors' "black-list," and yet be scrupulously honest. It was a harmful error against defendant to have the latter element put into the case.

The question is placed before us, whether it is a libel *per se* to publish in a commercial credit paper that a boarding-house keeper (giving name), is delinquent; or is unworthy of credit. We have concluded that it is. The law, recognizing the harmful results to business flowing from a bad name or reputation of the proprietor

concerning such business has always guarded the good repute of the innocent tradesman. So a publication as to one's business will be held to be libelous *per se* which would not be when applied to the individual. Thus, printing that "The opinion is expressed that a local bank has been secured" by the plaintiff who was a merchant, was held to be a libel *per se*. [Minter v. Bradstreet Co., 174 Mo. 444.] So the same was held as to printing that certain merchants "have assigned." [Mitchell v. Bradstreet Co., 116 Mo. 226.] And in this court it was held to be libelous *per se* to print that "Joseph Hermann, brickmaker, is in the hands of the sheriff." [Hermann v. Bradstreet Co., 19 Mo. App. 227.]

Something was stated in argument tending to disparage an action for libel which affects a business said to be so inconsequential as a boarding-house keeper. But it must be borne in mind that the law is not so restricted in its terms and meanings as only to include the ordinary mercantile pursuits. It is familiar learning in the law of libel that it includes the professional man, tradesman and artist. And it is said by the Supreme Court of Michigan (Weiss v. Whittemore, 28 Mich. 366) and by Townsend on Slander and Libel, quoted approvingly by our Supreme Court in Minter v. Bradstreet Co., *supra*, to include a "trade" or "employment." And Hermann v. Bradstreet, *supra*, involved the libel of a brickmaker. We therefore can see no reason why the law may not be applied to a boarding-house keeper. In this case the damage is claimed to have resulted to plaintiff from a loss of credit, and it is suggested that credit is not necessary to such business. Ordinarily credit is a necessity or convenience to any business which requires purchases, whether it be large or small. At least it is a right which accompanies a good business reputation and it should receive the protection of the law.

There was no special damages alleged. But, as the publication is libelous *per se*, none need be alleged and general damages may be proven. [Herman v. Brad-

street Co., supra.] In proving general damages plaintiff gave testimony as to her credit in certain mercantile establishments, and the loss of it. Defendant then, in cross-examination, undertook to show by her that she did not have credit in some of these, by showing that she was required to give chattel mortgages to secure purchases of furniture. This the court disallowed, and we think the ruling was error. It was cross-examination on the very subject she testified in chief and tended to explain, or qualify, or contradict, what she had stated as to her credit.

The position of the plaintiff concerning the application of the words published, is not sufficiently definite. If it is intended that her claim of damage is to be based upon the fact that she was engaged in a business in which credit was an element of value, she should distinctly plead at the time of the publication she was engaged in the business of a boarding-house keeper.

The judgment is reversed and the cause remanded. All concur.

EMMA CLARK, Appellant, v. KANSAS CITY, ST.
LOUIS & CHICAGO RAILROAD COMPANY et
al., Respondents.

Kansas City Court of Appeals, March 6, 1911.

CARRIERS OF PASSENGERS: Death of Child: Statutory Rights of Parents: Refusal of Husband to Join. The plaintiff's divorced husband executed a release to the defendant railroad company for his claim for damages for the death of their child, caused by the railroad's negligence, and refused to join with his wife in the action. Plaintiff then made her husband a party defendant, alleging as the reason therefor her husband's settlement with the defendant railroad. *Held*, that the provisions of section 2864, R. S. 1889, that "the father and mother" have a cause of action, and "may join in the suit,"

being in derogation of the common law, must be strictly construed, and that the language of the statute excluded the thought that either parent may have or prosecute a cause except in conjunction with the other, whatever may be the motive that actuates one of the parents in refusing to join as a party plaintiff. Hence, defendant's demurrer to the petition was rightly sustained.

Appeal from Jackson Circuit Court.—*Hon. John G. Park, Judge.*

L. A. Laughlin for appellant.

Scarritt, Scarritt & Jones for respondents.

JOHNSON, J.—After plaintiff in *Clark v. Railroad*, 219 Mo. 524, suffered defeat in the Supreme Court, she refiled her suit in the circuit court of Jackson county. In substance the new petition was the same as that considered by the Supreme Court, with the following exceptions:

First, instead of attempting to make her divorced husband a party plaintiff against his will, she made him a defendant along with the railroad company and, second, she added as a new matter the allegation that her divorced husband "has settled and released defendant for his claim for damages for the wrongful death of said Charles Ritter and refuses to join with plaintiff in the suit and, therefore, is made a defendant herein."

The defendant railroad company demurred to this petition on the grounds, among others: "1. Because there is a defect of parties plaintiff. 2. Because there is an improper and illegal joinder of parties defendant. 3. Because the plaintiff, Emma Clark, alone under the statutes of Missouri, cannot maintain this suit as plaintiff. 4. Because the petition does not state facts sufficient to constitute a cause of action against this defendant."

The court sustained the demurrer, plaintiff refused to plead further, judgment was rendered for defendant and plaintiff appealed.

It appears that plaintiff was encouraged to renew her efforts to circumvent the hard letter of the law by what was said by LAMM, J., in the following paragraph of this opinion filed in the former case (p. 537) :

"It is argued by appellant's counsel that Thomas Ritter settled with defendant, hence his refusal to join. We are cited to cases elsewhere holding that one of two persons entitled to jointly share in a statutory penalty, or who are jointly interested in the proceeds of a judgment based on such statute, may not execute a release barring the other. We doubt not that such doctrine is good law in this jurisdiction. But, at the outset, it is well to keep the case within the channel marked out in the petition. There is no allegation that Thomas settled with defendant or executed a release. Therefore, that phase of appellant's brief must be taken as coloring matter, used *arguendo* by way of hypothesis."

Considered in the light of the context, that paragraph does not support the contention of plaintiff that she is entitled to prosecute the action as the sole plaintiff, because her divorced husband will not join her, having made his peace with the railroad company. We concede, *arguendo*, as did Judge LAMM, "that one of two persons entitled to jointly share in a statutory penalty, or who are jointly interested in the proceeds of a judgment based on such statute, may not execute a release barring the other." But this concession still leaves plaintiff in the predicament of attempting to go it alone when the law, senselessly enough, insists that she be yoked with her whilom spouse from whom she parted company for the reason that with him as a mate the yoke was too galling.

The common law afforded the parents of the deceased child no cause of action for the negligence of the

defendant railroad company that caused his death. The cause asserted by plaintiff is founded on section 2864, Revised Statutes 1899, which provides "if such deceased be a minor and unmarried, whether such deceased unmarried minor be a natural born or adopted child, if such deceased unmarried minor shall have been duly adopted according to the laws of adoption of the state where the person executing the deed of adoption resided at the time of such adoption, then by the father and mother, who may join in the suit, and each shall have an equal interest in the judgment; or if either of them be dead, then by the survivor."

Our understanding of the opinion of Judge LAMM is that this statute being in derogation of the common law must be strictly construed; that rights must not be deduced from it by the courts the creation of which is not to be found in the plain letter of the statute, and that since the statute says "the father and mother" will have a cause of action and "may join in the suit" the language excludes the thought that either may have or may prosecute a cause except in conjunction with the other. Whatever may be the motive that actuates one of the parents of the child to refuse to join as a party plaintiff, such refusal would be fatal in any case to the right of the other parent to maintain the action. Plaintiff must fail, not because the father of the child executed a release to the railroad company but because alone she has no standing in court. It is an outrage on justice that she should be thus defeated at the very threshold of her case, but the fault is in the statute, not in the interpretation thereof by the courts. The Legislature should amend the statute to avoid a recurrence of such distressing miscarriages of justice.

The judgment is affirmed. All concur, *Ellison, J.*, in separate opinion.

SEPARATE OPINION by ELLISON, J.

I concur solely on the ground that the question is decided by the Supreme Court in *Clark v. Railroad*, 219 Mo. 524. But for that decision I would have said the case came within the terms of section 544, Revised Statutes 1899, which provides that where one jointly interested in a cause of action with another, refuses to become a party plaintiff, he cannot thereby destroy the right of the other; the latter being authorized to prosecute the action by making him a defendant.

It is was argued that the case decided by the Supreme Court involved a question whether one of the two jointly interested has a right to make the other a party *plaintiff* without his consent, and that therefore it is not applicable to the case as it now stands, where the non-consenting party is made a defendant as provided by the statute. But it is apparent that the court decides that if one refuses to join as a plaintiff, the action cannot be maintained .

CITY OF INDEPENDENCE, Respondent, v. INDEPENDENCE WATERWORKS COMPANY, Appellant.

Kansas City Court of Appeals, March 6, 1911.

MUNICIPAL CORPORATIONS; Waterworks: Regulation of Rates by Ordinance: Meters. By ordinance, the minimum water rate was raised five cents per thousand gallons, and a provision was inserted therein that the water company should make no rental charge for meters which it installed. Under the terms of the company's charter, the water rates could only be revised by a mutual agreement between the city and the water company. The company did not accept the entire proposition of the city. It did, however, put into effect the proposition for the increase of rates, but refused to permit the free use of its

Independence v. Waterworks Co.

meters, and threatened to remove them unless the consumers paid rental. *Held*, that, where the city is content with the remedy afforded by the judgment of the circuit court holding that the company had authority to charge consumers a rental for the use of its meters, but enjoining it from making any additional charge for water, such judgment will be affirmed, although perhaps the city might have enjoined the company from charging rent for the use of its meters upon the theory that, having accepted and acted upon one part of the proposed rerating, it was estopped from denying the binding effect of the remaining part of the proposition.

Appeal from Jackson Circuit Court.—*Hon Walter A. Powell*, Judge.

AFFIRMED.

J. M. Cullahan and Cook & Gossett for appellant.

Allen C. Southern for respondent.

BROADBUSH, P. J.—This is a suit by the city of Independence to restrain the defendant Waterworks Company from putting into effect its declared intention of compelling private consumers of water by water meter service, to pay a rental for their use, or else the company will remove about one thousand such meters belonging to and previously placed on the premises of the water users by the company.

Before the case came to trial the pleadings were amended so as to bring in issue the question of rates of compensation the company was claiming the right to charge and collect from private water consumers, being at the rate of thirty cents per thousand gallons for water delivered on meter measurement.

The water company furnishes water to its patrons on what is known as the flat rate; that is, so much for a house; the minimum being \$5.25 per annum payable quarterly for a four room house, and the rate increasing proportionately for larger houses with more rooms, etc. The other is the meter rate, that is, the consumer

pays so much per thousand gallons by measure. Under this plan the consumer is bound to pay for so many thousand feet whether he uses it or not; if he uses more than the so many thousand feet he pays for the extra at the same ratio.

Under what is called the revision ordinance of the city, January, 1905, the consumer paid twenty-five cents per thousand for 24,000 gallons of water whether the consumer used it or not. This made the minimum meter rate six dollars per annum.

The defendant is the successor of the Independence Water Company established in 1883, and was granted its franchise in 1898. The old water company charged for water used on meter service thirty-five cents per thousand gallons with minimum charge of nine dollars per year, and while it was in business, put in a number of water meters at its own cost.

The defendant after it commenced to operate the water plant followed the same rate of charges for water consumed on meter service and installed many new meters at its own expense.

In 1909 the city at the request of the company proposed by ordinance to revise the water rates. The minimum meter rate as heretofore stated, was fixed at thirty cents per gallon for 20,000 gallons to each consumer. But the city by its council, in section 4 of its proposed ordinance provided that: "On all meters heretofore installed or which shall be hereafter installed, either by the company or the private consumer, as provided by the franchise, there shall be no rental, inspection, repair, or maintenance charge. . . ."

The company refused to accede to the provisions of said section 4, and insisted on charging consumers twenty-five cents a month as a rent for their use of its meters; and upon the failure of the consumers to pay said rental or put in meters of their own the company asserted its right to remove the ones that they had theretofore put in for their use.

The defendant's charter contains the following in reference to private meters: "Private water consumers where they desire so to do, shall be permitted to use water by meter measurement upon furnishing an approved meter and said water company reserves the right to set meters whenever there is any doubt as to the quantity of water used or wasted."

The charter in question constitutes what is called a contract between the city and the company and the city is powerless to impose upon the company further conditions and burdens without its consent. This is conceded by all to be the law. [State ex rel. v. Corrigan, 85 Mo. 263; Los Angeles v. Waterworks Co., 177 U. S. 558.] The charter of the company does not authorize the city to make a revision of water rates every two years. It reads: "The private water rates to consumers shall be agreed upon by said Independence Waterworks Company and the council of the city of Independence, which shall be no higher than the average rate of St. Louis, etc., . . . which rate shall be subject to revision every two years by said Independence Waterworks Company and council of the city of Independence." Thus it will be seen that there can be no revision until both the city and the company agree upon its terms. The ordinance in question was binding upon neither the city nor the company until it was accepted by the company. Until then it was only a proposed revision of the water rates.

The company did not accept the proposed revision, but it put into effect the proposition to the increase of five cents per thousand gallons of water, but refused to accede to that part of the proposal to permit the free use of its meters to the private water consumers, and threatened to remove such meters unless the consumers paid rent for their use.

At this stage of the controversy the city asked the aid of the court to compel the company to forego charging the additional rate to consumers. The company

answered that it has accepted the increase for compensation for water furnished consumers, because it was a reasonable regulation, but that it repudiates the requirement to refrain from charging rental for its meters. It is willing to accept the benefits of the proposal, but denies its willingness to accept its burdens.

The company's contention, that it had the right to reject one and accept the other of the proposed revisions of rates would perhaps be true if the city was authorized under the charter, to revise rates without consulting the company. The company in such case would only be bound by reasonable regulations.

But as said the case is entirely different. It is altogether a matter of agreement. The city has no power to revise without the consent of the company. Such being the situation, the company had no authority to raise rates to the private consumer unless it accepted the entire proposition of the city.

The court held, that the company had the authority to charge consumers a rental for the use of its meters, but enjoined it for making the additional charge to consumers of five cents per thousand gallons of water. Perhaps the city might have enjoined the company for charging for the use of its meters upon the theory of its having accepted and acted upon one part of the proposed rerating, it was estopped from denying the binding force and effect of the remaining part of said proposition, but as the city does not rely upon such estoppel and is content with the remedy afforded by the judgment, there can be no cause of complaint. As the matter stands, the whole question is left open for future adjustment, which is all that is necessary to preserve the rights of both parties.

The rightfulness of the judgment we think is unquestionable. Affirmed. All concur.

MATTIE BRITT et al., Respondents v. SOVEREIGN
CAMP WOODMEN OF THE WORLD, Appel-
lant.

Kansas City Court of Appeals, February 13, 1911.

1. **FRATERNAL BENEFICIARY ASSOCIATIONS: Forfeitures.** The contract between the deceased husband of plaintiff, and the defendant, a fraternal beneficiary association, contained stipulations that provided automatically for his suspension from membership, and the forfeiture of his insurance, if he failed to pay his dues within a stated and very limited period. Deceased failed to pay such charges for at least five months. Defendant, however, failed to give notice of assessments, and timely notice of a suspension of deceased. The defendant's local lodge moreover assured plaintiff that pursuant to a custom authorized by defendant, no suspension or forfeiture would be declared during her husband's illness. *Held*, although but for these facts, the delinquency of the husband would have *ipso facto* destroyed his membership, and forfeited his beneficiary certificate, defendant could not declare a forfeiture on account of the non-payment of such charges, at least until it had notified the husband of its decision to carry him no longer, and had given him a reasonable opportunity to pay his arrearages.
2. —: **Notice of Assessments.** Where defendant elected to treat regular fixed assessments as assessments to be levied by the sovereign camp in the form and manner prescribed for levying irregular assessments, it should be held to its own characterization of the assessments in controversy, and since it treated them as special assessments, they should be so regarded and defendant should be held to the performance of the stipulation requiring the giving of notice.
3. —: **Forfeitures: Repudiation of Lodge's Custom.** Where, pursuant to a uniform custom known to and approved by the sovereign camp, the local lodge assured plaintiff that her husband's assessments and dues would be paid during his illness, it would be shocking to conscience to permit defendant to repudiate that agreement at a time when the defendant saw that a loss was impending and when it was too late for the member to help himself.

Appeal from Jackson Circuit Court.—*Hon. W. O.
Thomas, Judge.*

AFFIRMED.

James W. Garner, Hunt C. Moore and A. H. Burnett for appellant.

(1) Parties to a contract of insurance are free to insert in it whatever condition they please, providing there be nothing in them contrary to the law or public policy. 2 Bacon on Benefit Societies, sec. 352, p. 880; *Kennedy v. Grand Fraternity*, 36 Mont. 328. These authorities further declare that the time fixed for the payment and the time at which the policy is to become void is of the essence of the contract and no notice of lapse is necessary. (2) Stipulations in a contract that non-payment of assessments shall *ipso facto* work a forfeiture, and a failure to pay at the time stipulated works a forfeiture of the certificate. *Lavin v. Grand Lodge*, 104 Mo. App. 1; *Boergrafe v. Knights of Honor*, 22 Mo. App. 127; *Ellerba v. Faust*, 119 Mo. 653; *Lavin v. Grand Lodge*, 112 Mo. App. 5; *Messenback v. Maccabees*, 139 Mo. App. 76; *Gruwell v. K. & L. of S.*, 126 Mo. App. 496; *Boyce v. Royal Circle*, 99 Mo. App. 349. The certificate sued upon in this cause is subject to all of the laws, rules and by-laws of the appellant, and they are made a part of the certificate. *Richmond v. Supreme Lodge*, 100 Mo. App. 8; *Leech v. Order of R. R. Tel.*, 130 Mo. App. 5; *Lloyd v. M. W. A.*, 114 Mo. App. 283. (3) The notice of suspension, the evidence shows, was promptly sent, and was in compliance with the by-laws introduced in evidence by the respondent. *Pierre v. Heinrichshofen*, 67 Mo. 165; *Rolla v. State Bank*, 95 Mo. App. 405; *Ward v. Transfer & Storage Co.*, 119 Mo. App. 89. (4) These provisions of the contract were binding upon Britt and are subject to the same rules of construction as contracts generally. *Levine v. K. of P.*, 122 Mo. App. 547; *Morton v. Supreme Council*, 100 Mo. App. 76; *State v. Benefit Association*, 72 Mo. 146; *Walsh v. Hill*, 38 Cal. 481; *Burner v. Wheaton*, 46 Mo. 363. (5) Custom does not govern where there is a contract in conflict with such customs. In

such a case the contract does away with the custom and the liabilities of the parties are controlled by the contract. *Landa v. Bank*, 118 Mo. App. 356; *Bolton v. Railroad*, 172 Mo. 92.

E. W. Shannon and *E. L. Snyder* for respondents.

(1) A prima facie case was made for plaintiffs and the defendants assumed the burden of proof. "The certificate issued to the member is evidence of good standing; . . . status once fixed is supposed to continue until the contrary is shown." *Johnson v. W. O. W.*, 119 Mo. App. 98; *Mulroy v. Supreme Lodge*, 28 Mo. App. 463. "The delivery of the policy sued on put in force a contract good for a lifetime and the contract could not be forfeited by failure to pay subsequent premiums." *McMasters v. Ins. Co.*, 90 Fed. 40; *Gruwell v. National Council*, 126 Mo. App. 496. "No forfeiture can be established except for a violation of the precise conditions laid down" and "no presumption will be entertained." *Bacon Ben. So.* (3 Ed.), sec. 377; *Earney v. M. W. A.*, 79 Mo. App. 383; *Puschmann v. Ins. Co.*, 92 Mo. App. 640; *Hannum v. Waddell*, 135 Mo. 153; *King v. Ins. Co.*, 133 Mo. App. 612. (2) The appellant attempted to show a notice of suspension, but Mrs. Britt said that no such notice was received by Mr. Britt until a few days before his death and that she went at once to the clerk, Werner, to make such payments as might be required. This raises an issue for the jury, which was submitted to the jury and passed on adversely to appellant. *Hannum v. Waddell*, 135 Mo. 153. (3) It is well settled that the law abhors forfeiture and will relieve against it if possible, and this rule applies to certificates of membership issued by associations such as defendant. *Burchard v. Western Com. Ass'n*, 139 Mo. App. 606. The defendant cannot complain because this issue was submitted to the jury, for the defendant asked to have that question of controvert-

ed fact submitted to the jury. *Hopkins v. M. W. A.*, 94 Mo. App. 402. If Mr. Britt had funds in the hands of the local camp sufficient to have paid the assessment claimed for November, 1907, then such sum should have been applied to prevent a forfeiture. *Supreme Lodge v. Welch*, 60 Kan. 858; *Elliott v. Grand Lodge*, 2 Kan. App. 430; *Purdy v. Bankers Life*, 101 Mo. App. 91; *Supreme Lodge v. Meister*, 68 N. E. 454; *Fra. Aid Assn. v. Powers*, 67 Kan. 420. *Demings v. Sup. Lodge*, 48 N. Y. S. 649; *King v. Ins Co.*, 133 Mo. App. 612. If he was wrongfully suspended it rested on the defendant to show that Mr. Britt was notified of such suspension and that notwithstanding such notice Mr. Britt failed to take any action toward setting aside such wrongful suspension and manifested an intention to abandon his membership. *Bange v. Legion of Honor*, 128 Mo. App. 461; *Meisenbach v. Maccabees*, 140 Mo. App. 76. A levy of subsequent assessments waives any former forfeiture. *Beatty v. Mutual Reserve*, 75 Fed. 65; *Mee v. Bankers Life*, 54 Ill. App. 445; *M. W. A. v. Anderson*, 71 Ill App. 357; *M. W. A. v. Jameson*, 48 Kan. 718.

JOHNSON, J.—Plaintiffs, the beneficiaries of a death benefit certificate issued by defendant May 16, 1906, to Edward Britt, commenced this suit in the circuit court of Jackson county to recover the amount alleged to be due them under the terms of the certificate. It is conceded that Britt died May 6, 1909, and that defendant refused to recognize the demand of plaintiffs as a valid obligation. The cause pleaded in the petition is stated as one founded on an ordinary life policy. The answer admits the defendant issued its beneficiary certificate to Edward Britt, payable to plaintiffs in the event of the death of the holder, but alleges that defendant is a fraternal beneficiary association, incorporated in Nebraska and authorized to do business in this state, and that Britt, at the time of his death, had ceased to be

a member of the association and had forfeited the certificate because of his failure to pay certain assessments levied in accordance with defendant's constitution and by-laws, which constituted a part of the contract of insurance. The answer is voluminous and we need not comment further on it than to say it was sufficient to raise the issues we shall discuss. The case was tried before a jury and the cause is before us on the appeal of defendant from a judgment recovered by plaintiffs.

The evidence discloses—and the court so instructed the jury—that defendant, during the period of the transaction in controversy was a fraternal beneficiary association authorized to do business in this state. It has a lodge system with ritualistic form of work, a representative form of government, and issues benefit certificates in accordance with its constitution and laws. Its head lodge and office is in Nebraska, but it has branch lodges or “camps” scattered over the country, among them “Oakwood Camp No. 82,” in Kansas City of which Britt became a member.

The certificate issued to Britt stated that it was “issued and accepted subject to all the conditions on the back hereof and subject to all of the laws, rules and regulations of this fraternity now in force or that may hereafter be enacted, and shall be null and void if said sovereign does not comply with all of the said conditions and with all of the laws, rules and regulations of the sovereign camp of the Woodmen of the World, that are now in force or which may hereafter be enacted, and with the by-laws of the camp of which he is a member.”

The by-laws gave certain sovereign officers authority to levy assessments to pay death losses, etc., and provided in addition that “Every member of this order shall pay to the clerk of his camp each month one assessment . . . which shall be credited to and known as ‘Sovereign Camp Fund’ and he shall also pay such camp dues as may be required by the by-laws of

his camp. He shall pay any additional assessments for the sovereign camp fund and camp dues or either which may be legally called."

The failure to pay any such dues or assessments on or before the first of the month following *ipso facto* suspended the member and the by-laws provided that "during such suspension his beneficiary certificate shall be void." The regular monthly assessment the certificate required Britt to pay was \$2.05, to the sovereign camp fund and dues to the local camp of twenty-five cents.

The suspension of Britt from membership in the order and the forfeiture of his certificate were and are claimed by defendant to have resulted from his failure to pay regular assessment No. 206 due November 1, 1907. Plaintiffs contend that he paid that assessment but it is conceded that none of the subsequent monthly assessments were paid. Although such assessments were regular and definite, it appears to have been the custom of defendant to observe the same formalities with respect to them as were provided in the laws for levying other assessments. On October 20, 1907, the sovereign clerk was notified in writing by the sovereign commander and the chairman of the sovereign finance committee "that one assessment was necessary to be collected from all members during the month of November, 1907." On receipt of this notice the sovereign clerk sent out a notice of the assessment to the clerks of the local camps, including the clerk of Oakwood Camp No. 82. In this notice the clerk was requested "to mail to the last known postoffice address or deliver to every member of your camp on or before the 5th day of November, 1907, a reminder to pay said sovereign camp fund assessment and camp dues." It was the practice of the local clerks to send out notices to the members in obedience to these requests from the sovereign clerk. Such was the method followed with respect to the regular assessment for the months intervening between assessment No. 206 for

November, 1907, and the death of Britt which, as stated, occurred in May, 1908. The answer pleaded "that the said Edward Britt did fail to pay said assessment for the said month of November, on or before the first day of December following, and by reason of his failure to pay the same, his certificate became null and void and he was on that day suspended and is not entitled to recover in this action . . . and that although assessments have been regularly made each month since the first day of December, 1907, up to and including the date at which the said Edward Britt died, he has never paid any monthly assessment, nor has anyone else paid it for him."

The laws gave a member who was suspended for the non-payment of assessments or dues ten days from the date of his suspension in which to be reinstated, and required the sovereign clerk to mail a written notice of suspension to the delinquent member, but provided that "the failure to send such notice shall in nowise affect the legal suspension of such member."

The evidence of defendant is to the effect that notices of the assessments from November, 1907, to the time of the death of Britt, were mailed to him and that he received them, and that a suspension notice was mailed and received by him. This evidence is contradicted by that of plaintiffs. Britt was sick during the entire period and was confined to his bed from January, 1908, to his death. His wife received all his mail and she states that no notices of assessments and no notices of suspension were received until three days before her husband died. She called at once on the clerk of the camp and offered to pay all arrearages of assessments and dues, but the clerk refused to receive such payment except on the impossible condition that she produce a certificate of good health from the camp's physician.

The evidence of plaintiffs tend to show that both Britt and his wife supposed—and rightly so—that he had not been and would not be suspended for the reason that his assessments and dues were being paid by his camp during the protracted period of what proved to be his last illness. It appears that one of the vaunted fraternal features of the association was the custom of local camps (known to and approved by the sovereign camp) to come to the aid of disabled and distressed members by paying their sovereign camp assessments and dues until they could get on their feet. This custom was known to Britt and relied on by him. Early in November, Mrs. Britt went to the clerk of the camp and said to him (so she testifies):

“‘Mr. Werner, I don’t know when I will be able to pay any more. Mr. Britt is sick in the hospital and I would like you to notify your lodge members to that effect. . . .’ Mr. Werner replied, ‘I called in the lodge last Wednesday night and they will take a vote on it next Wednesday night.’” Mrs. Britt then continued: “I have my father and mother and little baby to take care of and I can’t possibly take care of these” (assessments).

At this time Britt was “sovereign” of the local camp and the camp records show he remained in that office and was recognized as sovereign until in January, 1908, when his successor was elected.

There are other facts in the record tending to show that the local camp carried Britt and that the sovereign camp did not move to suspend him until he stood in the shadow of death. All such facts are contradicted by the evidence of defendant, but as the evidence of plaintiffs is substantial, the two principal questions for our solution are, first, Does the record present issues of fact

for the jury to determine? and, second, If it does, were such issues correctly defined in the instructions of the court?

Our answer to the first question is that the pleadings and evidence do present issues of fact which, if solved in favor of plaintiffs would entitle them to the judgment before us. Fraternal beneficiary associations are regarded as beneficent in their purposes and have been the recipients of legislative and judicial favor. Courts recognize prompt payment of assessments and dues as necessary to their existence and the equitable administration of their affairs and uphold stipulations in their laws imposing the penalty of suspension from membership and forfeiture of all membership rights on the member who fails to pay such charges in the time and manner prescribed by such regulations. But the law never looks with favor on forfeitures and when one is claimed by a fraternal beneficiary association the law requires the claim of forfeiture to be based on the violation by the member of a precise condition laid down in the contract between the association and the delinquent member. [2 Bacon on Benefit Societies and Life Insurance (3 Ed.), sec. 377.]

The contract between defendant and Britt consisted of the beneficiary certificate issued to him and of defendant's constitution and by-laws which, by agreement, were made a part of the certificate. This contract contained stipulations that automatically provided for his suspension from membership and the forfeiture of his insurance if he failed to pay his assessments and dues within a stated and very limited period. He failed to pay such charges for five months and possibly for six months and, but for other facts to which we shall refer, we would hold his delinquency *ipso facto* destroyed his membership and forfeited his beneficiary certificate.

The contract contemplated and provided for two kinds of benefit assessments, one a regular monthly assessment, and the other such additional assessments as the sovereign body might find it necessary to impose from time to time for the purpose of paying death benefits and other proper expenses. The by-laws properly provided for giving members timely and proper notice of what might be termed irregular assessments, but contained no express requirement that such notice should be given of regular monthly assessments and dues. Nor was it necessary that the by-laws should require that notice of regular assessments and dues be given. We quote approvingly the following excerpt from the opinion of the St. Louis Court of Appeals in *Lavin v. Grand Lodge*, 104 Mo. App. 1. c. 17:

"The regular assessments levied by the defendant order to pay death losses are classified according to the age of the members. They are monthly and payable on or before the twenty-eighth day of each month. They are as regular as clockwork, are certain as to amount and time of payment, hence no special notice of their levy or of the amount or time of payment was necessary. A member holding a beneficiary certificate of the order, receives this notice once for all when he receives the certificate which in effect, incorporates this law of the order into the contract of insurance, and a member, by accepting the certificate, agrees to pay the monthly assessments as required by law 196, as a condition precedent to the continuance of his certificate in force. That it is competent for a beneficiary association, and a member thereof to so agree, it seems to us admits of no doubt and that such an agreement is just and fair to all the members of the order holding insurance certificates, is self-evident."

But this rule applied to the facts of the case in hand did not relieve defendant of the duty of giving Britt notice of the assessments in question for the reason that defendant elected to treat such assessments

not as regular, fixed charges on its members, but as assessments *to be levied* by the sovereign camp, in the form and manner prescribed for levying irregular assessments. It seems to have been in the contemplation of the head camp that even some regular assessments might be unnecessary and, consequently, on the 20th day of every month the officers charged with the duty of levying assessments met and made the approaching regular assessment the subject of a special levy and required the sovereign clerk to cause notice of the assessment to be given the members.

In other words, they converted regular charges into special charges. This practice was known to the members and, that it was relied on as a settled course of business, is made evident in the evidence of defendant which makes much of the contention that such notices in full were given to Britt.

In such state of facts, we think defendant should be held to its own characterization of the assessments in controversy and, since it treated them as special assessments, we should so regard them and hold defendant to performance of the stipulation requiring the giving of notice.

"A member of such society is presumed to know its laws, and the contract of insurance is to be construed as having been made under the limitations of those laws. But a member has a right to look to the general conduct of the society itself in respect of the observance of its laws, particularly those relating to his own duties, and if the society by its conduct has induced him to fall into a habit of non-observance of some of its requirements, it cannot without warning to him of a change of purpose, inflict the penalty of strict observance." [McMahon v. Maccabees, 151 Mo. 522.]

And, further, we think the evidence of plaintiffs strongly tends to show that the automatic suspension of Britt and the forfeiture of his certificate were arrested by the undertaking of the local camp to pay his assess-

ments and dues and that such undertaking was in accordance with a uniform custom known to and approved by the sovereign camp and that defendant did not attempt to violate this custom until it perceived that a loss was impending. These facts bring the case squarely within the doctrine of *Burke v. Grand Lodge*, 136 Mo. App. 1. c. 459, where we said:

"The subordinate lodge, unlike a stranger, was under the supervision and control of the grand lodge. The grand lodge could interdict the custom and put the local lodge under ban if it disobeyed. It had the power and exercised it of regulating and controlling its subdivisions and their members. It would be unjust and inequitable to say that the grand lodge might receive the benefits from a custom in derogation of its laws and then repudiate the obligations necessarily resulting from such custom. The effect of its approval of the custom was to say to Burke: 'The grand lodge encourages the beneficent practice of your local lodge of preventing suspensions and forfeitures by giving aid from its treasury to its unfortunate but worthy members. You need not fear a forfeiture if you bring yourself within the pale of this custom.' We have here all the elements essential to a waiver. The course of dealing of the subordinate lodge became the course of dealing of the head lodge. Burke had a right to rely on it and to act on the supposition that he would not be summarily deprived of this important benefit without notice. On the hypothesis of facts presented by the evidence of plaintiff the automatic forfeiture of the insurance provided in law 197 was destroyed by the custom under consideration and no suspension or forfeiture could be declared without notice to the member."

If, as plaintiffs' evidence goes to show, the local lodge pursuant to this custom, assured Mrs. Britt that her husband's assessments and dues would be paid during his illness, it would be shocking to conscience to permit defendant to repudiate that agreement at a time

when it was too late for the member to help himself. If, on account of defendant's failure to give notice of assessments and timely notice of a suspension and of the assurance of the local lodge that, pursuant to a custom authorized by defendant, no suspension or forfeiture would be declared during his illness, Britt was lulled into a feeling of security and failed to pay his assessments and dues, defendant could not declare a forfeiture on account of the non-payment of such charges, at least not until it had notified him of its decision to carry him no longer and had given him a reasonable opportunity to pay his arrearages.

The court committed no error in sending the case to the jury.

Passing to the second proposition, we find the instructions, which are numerous and lengthy, correctly define the issues of the case and are in accord with the views just expressed. We do not find it necessary to lengthen this opinion by further reference to them. The case was fairly tried and the judgment is affirmed. All concur.

MARY M. MURRY, Respondent, v. MAGGIE R. KING,
Executrix of Nathan King, Deceased, Appellant.

Kansas City Court of Appeals, February 13, 1911.

1. **DEEDS OF TRUST: Sale: Purchase by Trustee or Cestue que Trust.** Where a deed conveyed the legal title of land to plaintiff as trustee, and vested the beneficial estate in her and her three children as tenants in common, and where subsequently one of the sons purchased his brother's interest, and plaintiff purchased the interest of the other son, the result of these transactions left the legal title to the land vested in plaintiff with the entire equitable estate vested in plaintiff and her son as tenants in common, since one *cestui que trust* may convey his interest to another, and since, while the law always looks with suspicion on a purchase by a trustee of a beneficial interest in

the property, such a transaction will be sustained where there is no suggestion of fraud, and no complaint was ever made by the vendor.

2. ———: **Proceeds.** Where a trustee who was also tenant in common of the beneficiary estate, with her son, sold the farm, which was the subject of the trust, the entire proceeds being received and retained by the son, who used his mother's share of the money as her agent with her knowledge and consent for her benefit, the radical changes wrought by these transactions were the exchange of places as trustee; the change of the subject of the trust from the farm to the money of the mother; and the fact that the trust was no longer evidenced and controlled by the original deed under which the farm was conveyed in trust to the mother, but was to be controlled by the terms of the oral agreement between mother and son at the time the son, as trustee, received the fund.
3. ———: **Parole Trust of Personality: Parole Proof.** Although there is no direct evidence of a trust agreement, where the circumstances tending to show the existence of a trust are definite and certain, respecting the subject matter, parties, and purpose, and are clear and convincing to the mind of the court, a parole trust of personal property may be created, and its existence proved by parole testimony.
4. **Pleadings: Proof: Variance.** There is substantial conformity between allegation and proof where the averment that the farm "was sold by said son acting for himself and plaintiff," and that he retained the entire proceeds of sale, is shown by the evidence to be literally true, although plaintiff was the trustee, and theoretically made the sale by a deed in consummation of the transaction conducted by her son as her agent for their common benefit.
5. ———: ———. In an action by the mother to enforce a parole trust of personality arising from the proceeds of the sale of the land which she had held as trustee, and the beneficial estate of which had been vested in herself and son, as tenants in common, an averment that plaintiff and her son were joint owners and tenants in common of the land, correctly stated their relationship to each other and the extent of their respective interests in the proceeds of the land.
6. ———: **Beneficiary: Estate of Trustee.** Where the son received the proceeds from the sale of land through the medium of the active co-operation of the mother, who was trustee of the land, and in a manner to show that plaintiff, the mother, as trustee, was disposing of the proceeds in the way prescribed by the trust, and was paying to the son his beneficial part, and, in addition, making him the custodian and trustee of her own

part, plaintiff can maintain an action in her individual capacity as beneficiary of the trust fund against the estate of the trustee.

7. **DEEDS OF TRUST: Statute of Limitations: Continuing Trust.** Where the evidence clearly shows that a continuing parole trust was created, neither laches nor limitations would begin to run against it until the death of one of the parties; or until there was a demand for the fund by the *cestui que trust* and a repudiation by the trustee.

Appeal from Boone Circuit Court.—*Hon. N. D. Thurmond*, Judge.

AFFIRMED.

N. T. Gentry for appellant.

Charles J. Walker and *Harris & Hay* for respondent.

JOHNSON, J.—This is an action in equity instituted December 11, 1909, in the circuit court of Boone county by the beneficiary of a trust against the estate of the trustee to recover the fund. The petition is in two counts. The trial resulted in a judgment for plaintiff on the first count in the sum of \$4607.50, and for defendant on the second count. Since defendant alone appealed it is not necessary to refer further to that part of the record dealing with the cause of action pleaded in the second count.

Plaintiff was the mother and defendant, executrix, the wife of Nathan King who died testate in Boone county February 8, 1909. In 1865 plaintiff, then the widow of Erastus King, deceased, and the mother of three minor sons—William, John and Nathan—received from her brother John A. Glasgow the gift of a farm of 480 acres in Boone county. The deed conveyed the legal title to her as trustee and the beneficial estate to her and her three children as tenants in common. Further, the deed provided "that said trustee may, whenever in her judgment it will be advantageous to those

interested therein sell said lands, privately or publicly, for such price as she may think adequate and sufficient and convey the same, or any part thereof by apt and proper conveyances and that whenever any such sales may be made, the proceeds shall be divided equally between said Mary M. and her three children." In 1874 Nathan purchased the interest of his brother William and in 1875 plaintiff purchased the interest of her son John.

Thereafter plaintiff and Nathan were the sole and equal owners of the beneficial estate. From 1865 to 1874 plaintiff and her children occupied the farm as a homestead. In the latter year Nathan married the defendant and continued to live on the farm, and plaintiff intermarried with Andrew Murry and resided with him on his farm in Callaway county until 1876 when he died and plaintiff returned to the old homestead and there lived with Nathan and his family until 1903 when Nathan sold and plaintiff conveyed the farm for the sum of \$16,000. The purchase price was paid by drafts payable to the order of plaintiff and Nathan. Both indorsed the drafts but the entire proceeds were received and retained by him.

Afterward Nathan bought a farm, paid for it out of the money in his hands belonging to him and plaintiff, and later sold it realizing a net profit of \$9000. He also bought a farm for plaintiff for which he paid \$2932.50. Plaintiff remained a member of Nathan's family until his death and throughout the long period of their constant association the relations between them were most intimate and confidential. Plaintiff permitted her son to use their land and money as his own. He did not account to her for rents and profits, but he supported her in a manner befitting her station in life. From September, 1907, to August, 1908, and from October, 1908, to June, 1909, plaintiff's mental faculties were so impaired that she resided in the State Hospital for the Insane at Fulton, but she recovered and now is

in her right mind. She is 79 years old and is enfeebled. Her expenses at the hospital were paid by her son. A niece of plaintiff testified that about two years before Nathan's death she had a conversation with him in which she said: "Nathan, you have been managing Aunt Mollie's business for her all these years. She is getting old and I want to know, you seem to have bought the place in Columbia, you say it is in your own name and I want to ask you about Aunt Mollie. Suppose you should die, what would become of her in her old age?" Nathan replied, 'Cousin Bettie, don't you worry a minute. When I am dead my books will show where every dollar of my mother's money is.'

There was no written trust agreement executed by Nathan and it transpires he did not keep book accounts with his mother. It is not disputed that he received her share of the proceeds of the sale of the homestead and there is no suggestion in the evidence of any agreement or understanding between him and his mother that he was not to handle her money for her use and benefit as her agent. His use of the money was with her knowledge and consent and we think it was mutually understood he was acting as her agent and trustee. At no time did he do or say anything indicative of intent to repudiate his trusteeship and to claim her money as his own.

Among the findings of fact made by the circuit court are the following:

"The court further finds that plaintiff is entitled to have and recover of the defendant the sum of \$8400, the amount received by said Nathan King, deceased, for plaintiff's interest in said 480 acres of land sold to Ira F. Hendricks, less the sum of \$210 paid out by him as plaintiff's share of the commissions paid to said F. W. Smith and less the sum of \$2932.50 paid by said Nathan King to John W. Hamilton for said forty acre tract of land and less the \$650 paid out and expended by said Nathan King for the support, maintenance and benefit

of the plaintiff, including her expenses at the hospital and the taxes paid on said forty acres of land, leaving a net balance which plaintiff is entitled to recover of \$4607.50.

The court further finds that plaintiff is entitled to have and recover of the defendant, interest on said sum of \$4607.50 so held by Nathan King, deceased, at the time of his death, at the rate of six per cent per annum from February 28, 1903, to the date of the judgment herein, amounting to the sum of \$1932, making a total sum of \$6539.50 under the first count of her petition; and that plaintiff take nothing by the second count of her petition."

There are other facts in the record but those stated control the disposition of the case.

As stated the deed from Glasgow to plaintiff vested the legal title of the homestead in her with the beneficial interest in her and her three children. The subsequent purchase by Nathan of the interest of one of his brothers was valid since the rule is well settled that one *cestui que trust* may sell and convey his interest to another. The purchase by plaintiff of another of the beneficial interests likewise was valid, notwithstanding she sustained towards the trust the dual relation of trustee and *cestui que trust*. No complaint of the transaction was ever made by the vendor; there is no suggestion of fraud and, while the law always looks with suspicion on the purchase by a trustee of a beneficial interest in the property, such transaction is not necessarily void and will be sustained even in a subsequent action brought by the vendor to set it aside where it clearly appears there was no fraud, no concealment by the trustee and no undue advantage taken by him. [Sal-lee v. Chandler, 26 Mo. 124; Richards v. Pitts, 124 Mo. 602.]

The result of these transactions left the legal title to the land vested in plaintiff with the entire equitable estate vested in plaintiff and Nathan as tenants in com-

mon, and such was the situation of the parties in 1903 when they sold the land.

That sale was authorized by the express terms of the trust deed and its legal effect was the equitable conversion of the land into personalty. It became the duty of plaintiff under the mandate of her trust to divide the proceeds of that sale equally between Nathan and herself. Practically that was what she did though, in fact, the whole transaction was conducted by Nathan as her agent. Not only did he receive his share but she turned her share over to him under circumstances which clearly evinced a mutual intent that he should take her money not as a gift but as her agent or trustee to hold and use it for her benefit. The radical changes in their relation wrought by this transaction were, first, the exchange of places as trustee and, second, the subject of the trust no longer was the farm but was her own money and the trust no longer was evidenced and controlled by the Glasgow deed but was to be controlled by the terms of their oral agreement and mutual understanding had at the time Nathan, as trustee, received this fund.

There is no direct evidence of such trust agreement. "A trust of personal property may be created by parol and its existence proved by oral testimony. Courts, however, do not permit such trusts to be established by evidence of a vague or uncertain character. The supporting testimony must be clear, explicit and leave no room for a reasonable doubt that a trust was intended. There must be certainty as to subject-matter, parties and purpose." [Carroll v. Woods, 132 Mo. App. 1. c. 501.]

"To constitute a trust there must be an explicit declaration of trust, or circumstances which show beyond reasonable doubt that a trust was intended to be created." [McKee v. Allen, 204 Mo. 1. c. 685.]

The circumstances tending to show the existence of a trust are definite and certain respecting the subject-matter, parties and purpose and, to our minds, are most

clear and convincing. The son was an able business man, was dutiful to his mother, bound to her by the closest ties of consanguinity and family relationship. For years she allowed him to manage and enjoy the profits of their land and, in return, he supported her in a manner suited to her station and eloquent of filial affection. He was her prop in her days of mature vigor and in her senescent age she permitted him to sell their land and, as might be expected, turned her share over to him. He used some of that money for her benefit, some for their joint benefit and much for his own benefit but, to his honor, he always recognized his trusteeship and spoke no word suggestive of a purpose to wrong his aged and helpless mother by a denial of her claim upon him.

Having ascertained that there was a new trust created by parol at the time of the division of the proceeds of the land and that the subject of this trust was personalty we turn our attention to the propositions advanced by defendant for a reversal of the judgment.

First, it is argued the proof not only fails to conform to the petition but contradicts the cause of action pleaded. We find substantial conformity between allegation and proof. The averment that the farm was "sold by said King acting for himself and plaintiff" and that he received the entire proceeds of the sale is shown by the evidence to be literally true though plaintiff was the trustee and, theoretically, made the sale by a deed in consummation of the transaction conducted by her son as her agent for their common benefit. The averment that plaintiff and her son were joint owners and tenants in common of the land, so far as the cause of action pleaded is concerned correctly stated their relationship to each other and the nature and extent of their respective interests in the proceeds of the land. The fact that plaintiff also was the trustee and, as such, the owner of the legal title was wholly immaterial to the cause and is purely historical, since the present trust did not

arise until after there had been an equitable conversion of the land into personal property and her trusteeship had been ended by the disposition of the proceeds in obedience to the terms of the original trust.

Secondly, defendant contends that plaintiff cannot maintain this action for the reason that it is prosecuted by her in her individual capacity and the only cause of action she could have would be one inuring to her in her representative capacity as trustee. That is a misconception of the nature of the cause of action presented by the pleadings and evidence. If, in acting as the agent for the trustee in selling the land, Nathan had failed to account for the proceeds received by him and had converted them to his own use instead of paying them over to the trustee, there would be force in defendant's argument. But no such thing occurred. True, Nathan received the proceeds but they came to him through the medium of plaintiff's active co-operation and in a manner to show that plaintiff, as trustee, was disposing of them in the way prescribed by the trust and was paying to Nathan his beneficial part and, in addition, making him the custodian and trustee of her own part.

Finally defendant argues plaintiff's demand is stale and is barred by the Statute of Limitations. The evidence shows quite clearly that the parol trust contemplated and intended that Nathan should keep and manage his mother's property an indefinite time, and as long as his management was satisfactory to her. She was too old and feeble to attend to her own business, had been accustomed to rely on her son and, no doubt, they mutually understood and intended that their life-long relationship should continue to her death. It was a continuing trust they created and neither laches nor limitation would begin to run against it until the death of one of the parties or until there was a demand for

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the fund by the *cestui que trust* and a repudiation of the trust by the trustee. There was no such demand or repudiation and, consequently, limitation did not begin to run until the death of Nathan.

The judgment is affirmed. All concur.

RICHARD J. SMITH, Appellant, v. GEORGE W.
WRIGHT et al., Respondents.

Kansas City Court of Appeals, January 30, 1911.

1. **STATUTORY CONSTRUCTION: Attorney's Lien: Assistant Attorney: Lien: Principal Attorney.** If the principal attorney in a case, on his own account and not as agent of his client, employs an assistant attorney, agreeing to pay him a portion of his contingent fee, the assistant attorney is not entitled to a lien for his services on either the client's or the principal attorney's part of the sum recovered. But if such assistant is employed by the principal attorney by authority of the client, he is entitled to a lien on the client's portion of the sum recovered.
2. ———: ———: **Equitable Assignment: Legal Remedy.** If an assistant attorney is employed by the principal attorney he has his action at law for his fee against the principal attorney and is not entitled to an equitable assignment of the principal attorney's fee to secure what the latter agreed to pay him.

Appeal from Jackson Circuit Court.—*Hon. Hermann Brumback*, Judge.

AFFIRMED.

H. S. Herider for appellant.

Sutton & Sutton for respondent.

ELLISON, J.—Anthanette Heinzle was a minor. She was injured in Kansas City while a passenger on the Metropolitan Street Railway. She brought an ac-

tion for damages through her "next friend." Defendant George W. Wright was employed as attorney by the next friend, to prosecute the suit, and a judgment of ten thousand dollars was recovered, which was affirmed on appeal, the accumulated interest pending the appeal making the total judgment twelve thousand two hundred and three dollars and thirty-three cents. The contract between Wright and the next friend was in writing and provided that he should receive a contingent fee of one-half of whatever sum was recovered from the street railway company.

After the action was begun and while it was pending in the trial court, Wright verbally employed the plaintiff to assist him in the case, agreeing to pay him for his services one-third of the fee he, Wright, was to receive, which would be one-third of one-half of the judgment if any was recovered.

When the judgment was affirmed, the Metropolitan Street Railway paid all but twelve hundred dollars of the amount, and the plaintiff, through her next friend, and with the approval of the probate court, accepted one-half of the total amount thereof as in full of her interest. Wright received the balance, except the \$1200 just mentioned, as his fee under the contract, but refused to pay one-third thereof to this plaintiff, alleged to amount to eleven hundred and twenty dollars. Plaintiff thereupon instituted this proceeding in equity, by petition in three counts, alleging, in substance, the foregoing facts, to restrain the Street Railway Company from paying the \$1200 to Wright and seeking, in one count, to enforce an attorney's lien for his claim. In another count he asks to be declared "the equitable assignee of the attorney's lien possessed and enjoyed by defendant Wright." In the remaining count he asks to be made the equitable assignee of Wright's lien and that he have "an equitable lien," and that the money yet in the hands of the street railway "be sequestered and appropriated to the payment of his fees."

The names of other attorneys appear in plaintiff's bill, but without explanation of how or why; and there is likewise some discrepancy in the share stated to be agreed to be paid to Wright and to plaintiff and the amount received by the former and claimed by the latter; but this in nowise affects the question presented, and is therefore of no consequence. The street railway company, Anthanette Heinze and her next friend, and one William B. Sutton, said to claim some interest somewhere in the matter, were joined as formal defendants with Wright.

Defendant Wright demurred to the petition on the ground that it fails to state a cause of action. The trial court sustained the demurrer.

The question presented upon which we must place our decision, is this: A party employs an attorney to prosecute a suit for damages, agreeing to pay him for his services a certain contingent fee or per cent of the amount recovered. That attorney, for himself and not as agent for his client, employs another attorney to assist him, agreeing to pay him a certain part of his contingent fee. A judgment is recovered. Does the statute providing for attorneys' liens, authorize the assistant attorney to enforce a lien for his interest?

It has been said that only the attorney who brings the action as attorney of record, can have a lien for his fee; but that cannot apply to ordinary conditions of the present day, and we are satisfied that an attorney, either at the beginning, or during the progress of the case, is within the purpose and protection of the statute. [Jackson v. Clopton, 66 Ala. 29; Balsbaugh v. Frazier, 19 Pa. St. 95, 99.] And such assistant may enforce such lien under the statute, though he was employed by the principal attorney, if the latter made the employment for the client and by his authority. Such were the cases of Harwood v. LaGrange, 137 N. Y. 538; People v. Pack, 115 Mich. 669, and others.

But neither of these instances is this case. Here, there is no pretense of employment by the client. The employment claimed was by the original attorney on his own account, the compensation to be paid by him. No case has been cited which affords any ground for the proposition that an attorney may employ assistant counsel in his own behalf, with the result that the assistant will have a statutory lien on the principal attorney's fee. The statute does not contemplate such condition of case. The statute stands for a lien to secure a fee from a client who has a cause of action, and not one due from one attorney to another.

Referring again to the two other counts in plaintiff's petition, we cannot see any ground, in the way contemplated by those counts, for permitting a proceeding in equity to supplant the ordinary action at law for the ordinary legal claim which plaintiff has against Wright.

We are satisfied the judgment should be affirmed. All concur.

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BY JOHN M. CLEARY.

ACCOUNTING, ACTION FOR. See Partnership, 8.

ACTION.

1. **Action: Cause of Action.** The term "cause of action" signifies plaintiff's primary right and defendant's wrongful violation thereof. *Rice v. Railroad*, 35.
2. **Same: Defense: What is.** Whatever tends to diminish plaintiff's cause of action, or to defeat a recovery in whole or in part, amounts in law to a defense. *Applegate v. Insurance Co.*, 63.

ADMISSIONS. See Evidence, 17, 18; Humanitarian Doctrine, 1; Mechanics' Liens, 1; Practice, Appellate, 36.

AFFIDAVITS. See Mechanics' Liens, 2.

AGENCY. See Carriers of Passengers, 28; Fire Insurance, 1.

Agency: Tortfeasor Employed by Two Principals. Where an operator at the time of the assault in question, was engaged in manipulating his instrument in connection with the operation of the trains of the defendant, and was subject to be discharged at the will of the defendant, and where he was solicited by plaintiff to send a private message, the duties that the operator performed for the private telegraph company being merely incidental, *held*, that the operator at the time was engaged in the performance of his duties as the agent of the defendant railroad company, and was not acting in the line of his duty as the agent of the Western Union Telegraph Company. *Roberts v. Railroad*, 638.

APPEAL AND ERROR.

Appeal and Error: Calling Trial Court's Attention to Error. In a suit for specific performance of a contract, or to have a lien declared on certain real estate, which had been purchased from defendant by another party during the pendency of the suit, the relief prayed for was denied and it did not appear that plaintiff had asked for a money judgment against defendant, nor that he had called the trial court's attention in his motion for a new trial, to the fact that he was entitled to a money judgment. *Held*, that he is not in a position to insist upon such judgment in the appellate court. *Dazey v. Laurence*, 435.

ASSAULT. See Carriers of Passengers, 12, 42.

ASSIGNMENTS. See Contracts, 8.

1. **Assignments: Assignment of Life Insurance Policy to Creditor: Equitable Rights of Beneficiary.** If a balance of the pro-

ASSIGNMENTS—Continued.

ceeds of a life insurance policy remains, after satisfying a debt of insured, which the policy had been assigned by the insured and the beneficiary to secure, the equitable title to such balance resides in the beneficiary. *Love v. Insurance*, 144.

2. **Same: Voluntary Payments: Assignment After Payment.** Decedent was killed while in plaintiff's employ and plaintiff paid the expenses of the funeral. Later a judgment was obtained against plaintiff on account of the death of the employee, and two years subsequent to paying the funeral expenses, plaintiff procured assignments of the accounts and filed its claim on the same in the probate court. The evidence is examined and *held* to show that plaintiff had in the first instance voluntarily paid the accounts and that no subsequent assignment of the same could be made. *Bell Telephone Co. v. Hamil Estate*, 404.
3. **Same.** When a party who has no interest to protect pays the debt of another without any request from the debtor, and when he is under no legal obligation to pay it, and pays it with no understanding at the time that an assignment is contemplated, he cannot afterwards, when it suits his convenience, to change front, secure an assignment of the debt and enforce collection from the debtor. *Ib.*
4. **Same: Party in Interest: Subrogation.** A party who has an interest in property to protect, and to do so pays an incumbrance thereon, may be subrogated to the rights of a holder of the debt and the law will treat him as the purchaser of the debt in order to protect him, even though no assignment of the debt was taken at the time. *Ib.*

ASSUMPTION OF RISK. See *Personal Injury*, 3.

ATTACHMENT. See *Damages*, 5; *Trespass*, 1.

1. **Attachments: Situs: Statutory Law.** The statute (Sec. 1752, R. S. 1909), requiring all suits by attachment to be brought in the county where the property attached is situated, is a part of the practice act applicable to a suit when the property alone is proceeded against, or when there are no other defendants in the same county. *Bank v. Rudert*, 450.
2. **Same.** By the provisions of the statute as to the place where ordinary actions shall be brought in connection with the statute providing where actions by attachment shall be brought, an action by attachment may be brought in the county where a defendant resides, or, if a non-resident, in the county where he may be found, although he has no property in such county; and an attachment writ may be directed to a county where such defendant has property, and the property there levied upon. *Ib.*
3. **Same: Judgments: Order of Publication.** Where, the order of publication against the defendant does not give his Christian name, the justice acquires no jurisdiction to render a judgment sustaining the attachment. *Railroad v. Morris*, 667.

ATTORNEYS. See *Instructions*, 6.

ATTORNEYS—Continued.

1. **Attorneys: Attorneys' Lien: Settlement of Case: Statute.** Under section 965, Revised Statutes 1909, where a settlement of a cause of action is effected with the client, without the written consent of the attorney, after notice of the attorney's contract and lien, a cause of action arises in favor of the attorney which may be enforced against the party settling, by a suit at law for the percentage of the settlement stipulated for in the contract of employment. *United Railways Co. v. O'Connor*, 128.
2. **Same: Right of Client to Settle.** Notwithstanding the attorney's lien statute, the client may settle his case, for, in the interest of the peace and repose of society the law encourages the compromise of litigation. *Ib.*
3. **Same.** Under sections 964 and 965, Revised Statutes 1909, where a plaintiff made a settlement without the consent of his attorney, who had given the required notice, and agreed to pay his attorney out of the money received, the settlement liquidated the cause of action and fixed the attorney's right of recovery against defendant in the action at the percentage stipulated in the contract of employment. *Ib.*
4. **Same: Discharge of Attorney: Rights of Client.** Notwithstanding the attorney's lien statute, a client may, for sufficient cause, discharge his attorney, and it may be, under proper circumstances, the lien of a recreant so discharged would be forfeited. *Ib.*
5. **Same: Attorney's Lien: Discharge of Attorney: Employment of Other Attorneys: Interpleader's Bill: Sufficiency.** A bill of interpleader by one against whom a suit had been instituted and who had settled the case with the plaintiff, without the consent of the attorney who tried the suit, to determine its liability as to said attorney and other attorneys who claimed to have a lien on the plaintiff's cause of action, alleged that an attorney instituted a suit for the plaintiff for damages; that he and his client had entered into a contract fixing his compensation at one-half of the amount of the recovery; that he had served the defendant with notice of his attorney's lien, as required by section 965, Revised Statutes 1909; that the client attempted to discharge him, but did not allege that she actually did discharge him; that the client entered into an agreement with other attorneys whereby she agreed to pay them one-half of the amount recovered by her, and that said attorneys claim a lien on the fund arising from the settlement of the case made by the client with the defendant, but did not allege that such attorneys were employed for the purpose of performing any services with respect to the cause of action on which the first attorney had instituted suit; that the client settled the case with defendant, and that the attorney first employed and those subsequently employed assert and claim a lien on the proceeds arising out of said settlement, and that said claims are identical and for the same sum and are not independent. *Held*, that defendant could not maintain a bill of interpleader to determine its liability to the several attorneys, because, under the facts stated, it was liable to the attorney who instituted the suit, since the bill alleged only an attempt on the part of the client to discharge him, and not that he was actually discharged for good cause, and since the bill did

ATTORNEYS—Continued.

not contain pointed allegations that the other attorneys performed services for the client under an agreement with her for compensation touching the identical cause of action on which the first attorney had instituted suit. *United Railways Co. v. O'Connor*, 128.

6. **Same: Effect of Employing Other Attorneys.** Under the attorney's lien statute, where a client enters into a contract with an attorney for a percentage of the amount recovered, such contract, by operation of law, amounts to an assignment to the attorney of the amount stipulated for therein, and the client can confer no rights on others touching the same, unless it would be in the case where such attorney was discharged for good cause and a new employment of other attorneys was made about the same subject-matter. *Ib.*
7. **Same: Contract for Services: Sufficiency of Consideration: Facts Stated.** An attorney engaged to defend a person under indictment, who had fled while out on bail, was also engaged by the bondsman to produce the fugitive in court and to prevent enforcement of liability on the bail bond. The attorney prevailed on the fugitive to return, produced him in court, and had the forfeiture of the bond set aside. *Held*, that whether or not the attorney was acting under his previous employment in prevailing upon the fugitive to return and in producing him in court, the procuring of the forfeiture of the bond to be set aside was not within the scope of his previous employment and was a sufficient consideration to support the contract, entitling him to recover the stipulated compensation. *Rollins v. Schawacker*, 284.
8. **Same: Lien: Client's Release of Joint Tortfeasor.** Plaintiffs, two practicing attorneys, brought this suit under the provisions of section 965, R. S. 1909, to recover an attorney's fee from the two defendant joint tortfeasors, a railroad and a powder company respectively, who had injured plaintiff's client. Pursuant to a contract providing that should their client settle his claim personally, his attorneys should be entitled to an equal fee, the plaintiff attorneys had previously brought suit against the powder company alone. Subsequently, their client compromised with the railroad company. The powder company then pleaded the client's release of the railroad company as a bar to the action against itself whereby said action was dismissed. *Held*, in the action for attorney's fees, that the trial court did not err in sustaining the separate demurrer of the powder company. *Laughlin v. Powder Co.*, 508.
9. **Same: Filing of Suit.** The filing of suit dispenses with the necessity of giving the notice of lien required by section 965, R. S. 1909, in respect to attorney's fees. *Ib.*
10. **Same: Release of One Joint Tortfeasor.** Although any act of defendant which destroyed the attorney's lien after it had attached to the cause of action made said defendant liable to the attorneys in an independent action, nevertheless the act of the defendant powder company in pleading the release given to the railroad company as a bar to the action against itself, was not such an act as to make it liable. The rule that where a principal profits by an unauthorized contract of his agent, he having enjoyed a benefit therefrom, must take the contract *cum onere*, does not apply in any sense to joint tortfeasors

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who do not stand in any contractual or confidential relations with one another, but who are jointly and separately liable whether they acted in concert or independently. *Ib.*

11. **Same.** A valid release of one joint tortfeasor releases all for the reason that the injured party having but one indivisible cause of action, in receiving satisfaction of part of his demand, satisfies the whole. *Ib.*
12. **Same: Estoppel.** When plaintiff's client settled his demand against the railroad company, one of two joint tortfeasors, he confessed that he had no cause of action against the powder company, the other joint tortfeasor, and would be estopped from repudiating that confession. Since the rights of plaintiff attorneys are derived from their client, in the absence of any allegation of fraud on the part of their client, they likewise are estopped. *Ib.*

BAILMENTS.

1. **Bailments: Action for Damage to Property Bailed: Estoppel of Bailee to Deny Title of Bailor.** Where a person receives personally under a contract with another to transport it, and thereby becomes bailee of the latter, he incontestably concedes the bailor's title, unless at least he can show the true owner is making an adverse claim. *Oehmen v. Portmann*, 240.
2. **Same: Parent and Child: Right of Parent to Sue for Child's Bailed Property.** Where a parent delivers a piano belonging to his child to others to be moved, and they injure it, the parent need not sue as natural guardian for damages, but may sue in his own right as bailor. *Ib.*

BANKRUPTCY PROCEEDINGS. See Mandamus, 1.**BILL OF EXCEPTIONS.**

1. **Bill of Exceptions: Signing and Allowing: Compelling Action: Mandamus.** The act of a judge of a court of general jurisdiction in allowing exceptions and signing a bill preserving them, while a judicial act, to be performed under the sanction of his oath of office, is under the control of a superior court by mandamus—not to advise the judge how he shall act, but to compel him to move in the matter; the mere act of signing and approving a bill of exceptions being of a ministerial nature, although the court has a legal discretion in determining the character of the particular bill to be signed. *Fenn v. Reber*, 219.
2. **Same: Signing and Allowing: Succeeding or Acting Judge: Circuit Court, City of St. Louis: Statute.** The phrase "shall go out of office" in section 2032, Revised Statutes 1909, providing that where a judge who heard the case "shall go out of office" before signing the bill of exceptions, it shall be signed by the succeeding or acting judge of the court in which the case was heard, does not mean, as applied to the circuit court of the city of St. Louis, where by virtue of section 4149, Revised Statutes 1909, the judges rotate in service between the nine civil and three criminal divisions, that the term of

BILL OF EXCEPTIONS—Continued.

office of the judge who tried the case must have expired, but means that he "shall go out of office" so far as concerns his presiding in that particular division of the court, so that where a case was tried in one of the divisions of said court and the bill of exceptions was signed by a judge other than the one before whom the case was heard but who was then sitting in said division, the record proper showing that the latter judge constituted the court at the time the bill of exceptions was signed and ordered filed, such bill of exceptions was signed by the proper judge. *Fenn v. Reber*, 219.

3. **Same: One Judge Only Qualified to Act: Courts.** Only one judge is qualified to sign a bill of exceptions, and there can be but one judge, whether *de facto* or *de jure*, for one division of court, and the bill must be signed by the judge who is presiding over the court at the time the bill is tendered and filed. *Ib.*
4. **Same: Nature and Purpose.** The object and purpose of the bill of exceptions is to make that a matter of record which otherwise would not be so. *Ib.*
5. **Same: Signing and Allowing.** Under section 2032, Revised Statutes 1899, the judge who is acting as judge of the court at the time the bill of exceptions is presented is the proper one to sign it, although he may not be the successor of the judge who tried the case by reason of another judge having presided in that court in the meantime. *Ib.*

BILLS AND NOTES.

1. **Bills and Notes: Failure of Consideration: Sufficiency of Evidence.** Evidence in an action upon a non-negotiable note, defended on the ground of a want of consideration, *held* sufficient to sustain a judgment for the plaintiff. *Rausendorf v. Pollman*, 211.
2. **Same: Ownership: Evidence.** The payee named in a negotiable bill and in possession of it is *prima facie* its owner. *Prybil v. Altemeyer*, 237.
3. **Same: Payment: Evidence.** The right of the payee of a negotiable bill to recover against the drawee cannot be affected by showing payment by the drawee to another, even though the payee's predecessor in title, in the absence of proof that such other was the holder of the bill or duly authorized agent of the holder, or in possession of it at the time. *Ib.*
4. **Same: Establishing Status as Indorser: Evidence: Inferences.** While the word "indorser" is frequently used in a popular way to designate a maker who subscribes his name on the back of a note, as well as an indorser in the technical sense of the term, yet when the parties to the contract, testifying that the indorsement was an accommodation one only, appear to be intelligent business men knowing the technical import of the term, the trial court may infer that the term was understandingly used. *Heaton v. Dickson*, 312.
5. **Same: Indorser: Signature on Back of Note.** If one who is neither a payee of a note nor an indorsee thereof signs his

BILLS AND NOTES—Continued.

name on its back before delivery, he becomes *prima facie* a co-maker, and not an indorser. *Ib.*

6. **Same: Effect of Payment by Co-Maker: Contribution.** The payment of a note by a co-maker extinguishes its obligation and excludes an action thereafter on the note itself, unless re-issued; but such payment confers a right on the maker so paying to sue the other co-makers solely for a contribution of their proportionate part of the amount of the payment, not exceeding the amount of the note, interest and costs. *Ib.*
7. **Same: Payment by Accommodation Indorsers: Subrogation.** The rule that an indorser of a note who pays the same thereby acquires title thereto and may sue the maker on the note itself applies to accommodation indorsers. *Ib.*
8. **Same: Establishing Status as Indorser: Parol Evidence.** In an action against a maker of a promissory note by one who indorsed his name on the back and who paid it to the holder, parol evidence is competent to show he signed the note as an accommodation indorser. *Ib.*

BURDEN OF PROOF. See *Carriers of Passengers*, 26; *Equity*, 3; *Trustees*, 3.

CARRIERS OF GOODS AND LIVE STOCK.

1. **Carriers of Goods and Live Stock: Contracts: Evidence: Contemporaneous Oral Agreement.** In an action to recover damages on account of the alleged breach of a written contract for the transportation of horses from U. to S., where the horses shipped at U. did not make up a carload, but the shipper proposed to the carrier that the car be stopped at C. that he might add eleven other horses, it is error to submit to the jury the issue of whether an oral agreement, contemporaneous with the written contract, was made by the parties, when the written shipping contract contained the words, "Stop C. to fill." *Banks v. Railroad*, 469.
2. **Same: ———:** The words of the stipulation in the written contract, "Stop C. to fill" standing alone do seem obscure, but considered in the light of their context, and of the nature and circumstances of the transaction, their meaning is clear and certain that a stop was to be made at C. to enable shipper to fill with other horses the partly loaded car. Under the rule that where a stipulation of a written contract is obscure in meaning, oral evidence is admissible for the purpose of ascertaining the meaning intended, the words of the stipulation cannot be construed to mean that a stop should be made to enable the shipper to unload and feed for two weeks. *Ib.*
3. **Same: ———:** The duty of a carrier to exercise proper care for the preservation of live stock in transportation should not be extended to compel a break in the transportation for two weeks in order that the shipper may improve, instead of merely preserve, the physical condition of his property. Where such a privilege is not stipulated for in the written contract, and that contract appears to cover the whole transaction, the privilege cannot be established by proof that it was the subject of a contemporaneous oral agreement. *Ib.*

CARRIERS OF GOODS AND LIVE STOCK—Continued.

4. **Same: Shipping Horses: Notice of Damage.** The provision in a contract of shipment that notice of loss or injury be given one day after delivery at destination, is valid, but it must be reasonably and justly construed in its application to the facts in each case. *McKinstrey v. Railroad*, 546.
5. **Same: Contract of Shipping.** The contract of a common carrier with a shipper limiting the carrier's common law liability is valid if made in consideration of a reduced rate, but where there is no reduced rate or other valuable consideration, the carrier is liable just as if the contract contained no such stipulation. *Ib.*
6. **Same: Contracts of Shipping.** A contract of affreightment is governed by the law of the place where it is made, unless it appears that it was otherwise intended by the parties. *Ib.*
7. **Same: Evidence.** The common understanding is sufficient to enable a person to form a reasonable opinion as to the effect of keeping a horse on a train for a period of fifty-seven hours, tied with two ropes, one from either side of the car with its head toward the center of the car, and the admission of such testimony was not error. *Ib.*
8. **Same: Evidence: Production of Papers.** The admission of evidence of notice to defendant to produce certain documents and papers did not greatly prejudice the defendant, as there was no attempt to prove a different case from that shown by exhibits actually produced during the trial. *Ib.*
9. **Same: Perishable Freight: Sale: Conversion.** Wholesale dealers at Kansas City, Missouri, sold twelve boxes of apples to a retail dealer in Muskogee, Oklahoma, for \$38.40 and shipped them with a railway company, taking bills of lading in duplicate; one of these was sent to a bank in Muskogee with draft attached on the buyer for the purchase price, and both had noted thereon, in writing, to notify the purchaser at Muskogee. Notice was given and the purchaser refused the freight. The carrier then notified him that if he did not take it away, it would sell. It was not taken and the carrier then sold for the best price obtainable. *Held*, that since by the law of Oklahoma a carrier of perishable freight, after giving notice of its arrival, may in a reasonable discretion, sell it without advertising, the carrier was not guilty of a conversion. *Fruit Co. v. Railroad*, 598.
10. **Same: Loading Stock: Time of Trains.** Where a regular stock train was taken off by the carrier, and an extra substituted without any time schedule, it was proper diligence in loading hogs for shipment by that train, to begin the loading when the time of arrival of the train was announced to the shipper by the carrier's agent. *Moss v. Railway*, 602.
11. **Same: Part of Shipment.** Where a carrier is notified by a shipper that he intends to ship three carloads of hogs to the market, and provides cars therefor, and the carrier's agent in charge of its train negligently delays moving the cars to the chute at the stock pens, and negligently takes the train out with only one of the cars of stock, and the others have to remain in the pens until the next day, and by reason of the heat and confinement shrink in weight, the carrier is liable for the damage. *Ib.*

CARRIERS OF GOODS AND LIVE STOCK—Continued.

12. **Same: Evidence.** Under an allegation of diligence by the shipper and of negligence against the carrier, it was not error to allow evidence that it was neither proper nor usual to begin to load stock until the time the train would arrive was known; and that stock trains of defendant's road never left the station with only a part of the shipment. *Ib.*

CARRIERS OF PASSENGERS.

1. **Carriers of Passengers: Railroads: Injury to Passenger: Presumption of Negligence.** The mere fact of injury to a passenger while on his journey, without any evidence connecting the carrier with its cause, does not raise a presumption of negligence; but where the passenger establishes the relation of passenger and carrier and indicates that his injury during transit resulted from a breach of duty which the carrier owed pertaining to his safety, a presumption of negligence on the part of the carrier arises, and thereupon it devolves upon the carrier to explain such presumption away. *Rice v. Railroad*, 35.
2. **Same: Care Required.** A carrier is not an insurer of the safety of its passengers, but it must exercise the highest degree of care of a very prudent person. *Ib.*
3. **Same: Injury to Passenger: Presumption of Negligence: Res Ipsa Loquitur.** A passenger who shows that the train collided with the top of a tree which had blown across the track and that he was injured in consequence thereof, shows facts from which a presumption of negligence of the carrier arises, and it then devolves upon the latter to acquit itself by showing there had been no breach of duty on its part. *Ib.*
4. **Same: Care Required: Assault of Passenger by Third Person.** A carrier is under no obligation to protect a passenger from the criminal assault of persons in the street in no way connected with the carrier and which assault there was no reason to anticipate. *Ib.*
5. **Same: Railroads: Injury to Passenger: Obstruction on Track: Presumption of Negligence: Res Ipsa Loquitur.** The presumption of negligence of a carrier arising from proof of injury to a passenger in consequence of a train colliding with an obstruction on the track is not overcome in every case by the carrier showing conclusively that the obstruction was one not under its control, since there are instances where the carrier might have been otherwise negligent in the premises and such negligence operated proximately to occasion the obstruction, and besides the high duty obtains against a carrier to maintain a clear track. *Ib.*
6. **Same: ———: ———: ———:** The presumption of negligence of a carrier arising from proof of injury to a passenger due to a collision of the train with an obstruction on the track continues to inhere with sufficient probative force to support a verdict until the carrier has overcome it by not only showing that it had no notice of the particular obstruction, but by showing as well that it was in no respect remiss in its duty in preventing the obstruction from finding its way upon the track in the first instance, and also until the carrier shows it could

CARRIERS OF PASSENGERS—Continued.

not have avoided the collision by employing the appliances at hand, after it saw or might have seen the obstruction. *Rice v. Railroad*, 35.

7. **Same: Duty of Carrier.** A carrier of passengers must look out for and remove such objects along and adjacent to its roadway as may threaten the safety of its passengers, and where threatening objects, such as decayed trees, stand immediately adjacent to the right of way and are sufficiently menacing to evince probable danger, it must exercise high care as to them, and must remove them when it can do so without becoming a trespasser. *Ib.*
8. **Same: Railroads: Injury to Passenger: Dangerous Tree Adjacent to Right of Way: Concurring Negligence.** In an action for injuries to a passenger in consequence of a train colliding with a tree which had fallen on the track, evidence that the tree had been standing for many years on premises adjacent to defendant's right of way in a decayed and threatening condition tended to prove a breach of duty on defendant's part in failing to remove such tree, and although a fire burning in the body of the tree contributed to its falling, still defendant's negligence in permitting it to remain standing was proximate, in that such negligence concurred with the act of another in starting the fire to cause the injury, and defendant's liability may be sustained on that score. *Ib.*
9. **Same: Obstruction on Track: Res Ipsa Loquitur; Pleading: Sufficiency of Petition.** In an action for injuries to a passenger in consequence of a train colliding with a tree on the track, the petition, which alleges generally, that defendant permitted a large tree to be and remain upon its track and negligently ran its locomotive and train of cars into the same, to plaintiff's injury, was sufficient, since under those facts, a presumption of defendant's negligence obtained, and the burden was cast upon defendant to exculpate itself from all manner of negligence which operated to induce the injury. *Ib.*
10. **Same: —: —: —: —: —: —: Specific Acts Included Under General Allegation of Negligence.** In such a case, the cause of action relied upon under the general allegation of negligence includes any and all derelictions on the part of defendant which operated proximately to breach defendant's duty in respect of its obligation to exercise high care for plaintiff's safety, so that it was not error to instruct the jury that, although the collision occurred as a result of the tree adjacent to the right of way falling across the track immediately before the approach of the train, the finding should nevertheless be for plaintiff, if the jury found the tree was greatly decayed and in danger of falling upon the track and had so been for a long time and that there was a fire burning therein, of which facts defendant had knowledge or might have had by the exercise of due care on its part, and because of such decayed condition, fire, and weight of the tree it fell upon the track, although the petition did not contain an express allegation as to the decayed and dangerous tree standing beside the right of way, nor as to the smoldering fire therein, nor that defendant had omitted its duty in respect of removing the tree before it fell. *Ib.*

CARRIERS OF PASSENGERS—Continued.

11. **Same: Railroads: Injury to Passenger: Obstruction on Track: Res Ipsa Loquitur: Pleading: Evidence.** In an action for injuries to a passenger in consequence of a train colliding with a tree on the track, where the carrier, after the passenger's prima facie case was made by invoking the presumption of negligence, sought to show that the tree recently fell on the track and that it came there without any negligence on its part, it was competent for the passenger in rebuttal to show the carrier's negligence in permitting the tree to stand beside the right of way, because the tree was a menace on account of its decayed and burned condition, though the petition merely alleged generally the negligence of the carrier in permitting the tree to remain on the track and in negligently running the train into it. *Ib.*
12. **Same: Street Railroads: Injury to Passenger Alighting from Car.** Where plaintiff, a passenger on defendant street railroad company's car, was promised by the conductor that the car would stop at the usual stopping place, and, on the car's slowing down, stood on the step, holding to the handrail, but through a sudden jerk of the car, resulting from acceleration of speed, was thrown to the ground and injured, defendant was liable, plaintiff being entitled to rely on the conductor's invitation to be prepared to alight. *Chalmers v. United Railways Co.*, 55.
13. **Same: Ordinary Jerk.** In such case it was not a prerequisite to a recovery by plaintiff to show the jerk of the car was extraordinary or unusual, but to show an ordinary jerk was sufficient, prima facie, under the circumstances. *Ib.*
14. **Same: Safety Stop.** The cause of action pleaded was the negligence of the carrier in suddenly starting the car while a passenger was in the very act of alighting. The car was stopped at a place not intended for use as a passenger station, and for another purpose than the admission and discharge of passengers. *Held*, that the carrier should not start the car while a passenger is alighting at such a place with the knowledge and consent of the conductor. Hence, a demurrer to the evidence was rightly overruled. *Kinyoun v. Railroad*, 477.
15. **Same: Instructions.** Where the gravamen of the action pleaded was negligence in suddenly starting a car that had been brought to a standstill before plaintiff started to alight, the court did not err in striking out the words "or moving slowly," in an instruction authorizing the jury to find for plaintiff, if they should believe that her fall was caused by the sudden start of the car while she was alighting, and that she was alighting "while said car was at said point, either stopped, or moving slowly." Such instruction enlarged the scope of plaintiff's cause of action to include negligence in starting a car in case where the forward motion of the car during the effort to alight could have been a co-ordinate factor in producing the injury. *Ib.*
16. **Same.** Where there is evidence in the record from which the inference would be reasonable that the car was moving so slowly that its motion could not have had any effect on the alighting passenger, it is prejudicial error to hold plaintiff to recovery, if at all, only on finding that the car came to

CARRIERS OF PASSENGERS—Continued.

a dead stop, and was in that condition when its sudden start threw her to the pavement. *Kinyoun v. Railroad*, 477.

17. **Same: Instructions: Humanitarian Doctrine.** In an action for damages for personal injuries sustained by the negligence of defendant's motorman in running down plaintiff who was diagonally crossing the street car tracks with his back to defendant's car, the recitation in the instruction given at plaintiff's request that defendant was liable if his motorman could have seen by keeping a vigilant outlook that plaintiff was approaching defendant's track, in time to have stopped the car, and negligently failed to do so, was a glaring misdirection to the jury, and serious error. *McGee v. Railway*, 492.
18. **Same: Contributory Negligence: Crossing Tracks.** A person who undertakes to cross the track of a street railroad, when an approaching car can be seen, by attempting to cross in front of a car, is guilty of contributory negligence. *Ib.*
19. **Same: Humanitarian Doctrine: Crossing Tracks.** In the absence of something in the conduct of a person who is guilty of contributory negligence in crossing a street car track, which indicates that he is unmindful of his surroundings, or regardless of them in intending to cross in front of a car, the motorman has the right to presume that he will stop without the danger line, and, if acting on that presumption, the motorman does not discover his peril until it is too late to stop the car, the company will not be liable for plaintiff's consequent injuries. *Ib.*
20. **Same: Humanitarian Doctrine.** Where the act of plaintiff, in going upon defendant's tracks without keeping a vigilant lookout for an approaching car from the rear, was such an act of contributory negligence as to preclude plaintiff's right to recover, unless his situation of peril was or could have been discovered in time for the motorman to have avoided striking him by the exercise of reasonable diligence, this is a case for the application of the humanitarian doctrine. *Ib.*
21. **Same: Contributory Negligence.** Where the street car which inflicted injuries from which plaintiff's father died, must have been from 900 to 1000 feet away when deceased first saw the car, and at that time was running at a speed of from thirty-five to forty miles per hour, and was not coming head on, but at an angle, and deceased took a second look when he was in a place of safety, which look, if taken, would have told an ordinarily careful man in his situation that the car was not then to exceed seventy-five feet away; that it had traveled a distance fifteen times greater than he had traveled in coming from the sidewalk; that it was not checking its speed, and that a collision would be unavoidable, if he attempted to cross in front of the car, *held* that the conduct of the deceased was negligence in law that precludes a recovery. *Gordon v. Railroad*, 555.
22. **Same: Excessive Speed of Car.** The duty of deceased, to pay close attention to his way over the tracks, was a continuing duty, and he was not excused from the performance of that duty by the presumption that he was entitled to indulge that the car would not be run faster than twenty miles an hour

CARRIERS OF PASSENGERS—Continued.

(the speed provided in the city's ordinance) and at that speed was too far away to menace him. *Ib.*

23. **Same: Humanitarian Doctrine: Excessive Speed.** Where a motorman is approaching a crossing at highly excessive speed, with the purpose of running by a regular stopping place, where people are waiting for his car, he has no right to indulge in the presumption that a pedestrian, who was one of a straggling group of persons slowly crossing the street, would stop in a place of safety, but the motorman should have been apprehended that deceased might be surprised and imperiled by his recklessness. Hence, if the same evidence be adduced at a subsequent trial, the issue of "last chance" negligence should be sent to the jury. *Ib.*
24. **Same: Railroads: Evidence.** In an action for personal injuries, where plaintiff's statement that the train was not in sight is contradicted by all the witnesses, and by the plain physical fact that the train must have been at or near a point in plain view of plaintiff, and not over sixty feet from the place of collision, the appellate court cannot accord any evidentiary weight to plaintiff's statement. *Pennell v. Railroad*, 566.
25. **Same.** Where plaintiff, had he looked, must have seen the defendant's train in time to have avoided the perilous position in which he discovered himself when too late to avoid injury, his own evidence affords him no cause of action on account of negligence of defendant which may have co-operated to place him in danger. *Ib.*
26. **Same: Humanitarian Doctrine: Burden of Proof.** Under the humanitarian or "last chance" doctrine, the burden is on the plaintiff to prove that defendant's servants saw or should have seen that he was going into a dangerous position, and was unmindful of the danger, and that defendant's servants had the means at hand for saving plaintiff, and had they made reasonable use of such means they would have saved him. The mere fact that the train causing the injury was being negligently run and struck plaintiff will not support an assumption that the negligence of defendant's servants was such that plaintiff's case should go to the jury. *Ib.*
27. **Same: Injury at Crossing: Negligence of Motorman.** Plaintiff was injured in a collision between the car of the defendant street railway company and a freight train of the co-defendant railway company. The collision occurred at a crossing at which was a flagman employed by the co-defendants. *Held*, that it was the duty of the motorman to hold his car in a place of safety until the crossing was clear, i. e., until it was beyond action of the train, resulting either from its recoil, or the reversing of its engine, and the motorman was negligent in attempting to cross the track whether the signal that he received from the flagman was to proceed or to remain stationary. *Augustus v. Railroad*, 572.
28. **Same: Agency: Flagman at Crossing.** A flagman who was hired by one of three railroad companies, but who was maintained at the crossing where the injury occurred at the equal charge of the street railway company, and the three railroad companies, one of whom was a co-defendant of the street rail-

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way company in this action, so far as the plaintiff was concerned, is the agent of the street railway company which is answerable for his negligence. *Augustus v. Railroad*, 572.

29. **Same: Pleading: General Allegation of Negligence.** Where the only specification of negligence as to a street railway company was that it "so negligently constructed, maintained, and operated its car line, and the car on which plaintiff was a passenger," etc., the allegation is general, and not specific, and under such an averment the plaintiff might recover on any conceivable negligence of the company that could have caused the collision. *Ib.*
30. **Same: Evidence: Negligence Generally Alleged: Burden of Proof.** Where only general negligence is charged, plaintiff is not required to adduce proof of specific negligence, but makes out a prima facie case by proving that she was injured by the collision. The burden of proof then shifts to the carrier of showing that the collision was not caused by its negligence, but was due to unavoidable accident, or the negligence of others. *Ib.*
31. **Same: Pleading: General Allegation of Negligence.** Where the allegations of negligence as to the first co-defendant are general, the fact that plaintiff made specific averments of negligence as to the second co-defendant, will not convert the averment of negligence on the part of the first co-defendant from a general to a specific charge. *Ib.*
32. **Same: Injury at Crossing: Duty of Motorman.** With or without warning from the brakeman of a train switching on a crossing, it is the duty of the motorman to know of the presence of the train, and not to attempt to cross as long as it is in striking distance. *Ib.*
33. **Same: Instructions.** Where the verdict of the jury is also against the second of two co-defendants, the first co-defendant cannot on appeal object to instructions that were too favorable to the second co-defendant. *Ib.*
34. **Same: Railway Crossing: Duty of Railroads.** In an action for injuries caused by the collision at a crossing, it devolves upon defendant railway company to take into consideration, in the exercise of ordinary care, the fact that it was running its train over a busy street in rightful use by pedestrians and vehicles, and not to approach the crossing without giving warning, and not to do anything in the running of the train which unnecessarily would enhance the natural and inherent dangers and risks attending the switching of freight trains over a grade crossing. *Ib.*
35. **Same: Negligence of Railroad.** Where there was no apparent necessity for the stopping of a train at a place where the taking up of slack in the train would clear the crossing, and the reaction would cause the end car to return to the crossing, and where the movement of the train away from the crossing, was caused by the taking of slack—a fact which was peculiarly within the knowledge of the trainmen, the defendant railway company was not in the exercise of reasonable care in stopping at a place where the train would "kick back." *Ib.*

CARRIERS OF PASSENGERS—Continued.

36. **Same: Concurring Negligence.** The fact that the motorman in the employment of the co-defendant street railway company did not measure up to the required standard of care, does not excuse the negligence of the co-defendant railway company for its invasion of the rights of ordinary travelers on the street (including the plaintiff) whose duty to themselves was only that of exercising ordinary care. *Ib.*
37. **Same: Specific Negligence of Railroad.** An averment of specific charges of negligence against the co-defendant railway company in that it negligently failed to warn the street railway company of the approach of its train is amply sustained by evidence that its rear brakeman, who knew the cars would recoll to the crossing, gave no warning of that fact, but left the safety of the passengers who were in no position to protect themselves, solely to the care of the motorman and flagman. *Ib.*
38. **Same: Appellate Practice: Evidence.** In an action by a passenger against a common carrier to recover damages for personal injuries caused by the negligence of the carrier in suddenly starting the car while the passenger was alighting therefrom, the appellate court will not disregard the testimony of three witnesses that the car did start while plaintiff was alighting, ran from two to four feet, and then stopped, on the ground, as contended by appellant, that this testimony can not be reconciled with the physical facts of the case, and that therefore defendant's request for a peremptory instruction should have been granted. *Zeiler v. Railway*, 613.
39. **Same: Jury Question.** The question whether it was physically impossible for the car to have been started by the motorman with enough violence to cause plaintiff to lose her balance, and yet for the car to have been stopped in two or three feet, was for the jury, and the court did not err in overruling defendant's demurrer to the evidence. *Ib.*
40. **Same: Instructions.** It was not error for the plaintiff's instruction to inform the jury of the nature of the legal relations between carrier and passenger, i. e., that it was the duty of the operators of the car not to start it, until plaintiff had stepped in safety to the pavement, when such information was pertinent to one of the contested issues of fact in the case. *Ib.*
41. **Same.** Where the gravamen of the action was the negligence of defendant's servants in allowing a car under their control to start prematurely, an objection is hypercritical on the ground that the instructions broadened the scope of the cause pleaded in authorizing a verdict on finding that defendant "caused or permitted said car to be moved," while the petition alleged that defendant "caused and permitted." *Ib.*
42. **Same: Assault: Instructions: Ejection from Office.** In an action for damages for injuries caused by an assault on plaintiff by defendant's telegraph operator in ejecting plaintiff from the office, an instruction that it is not necessary that plaintiff should have received a special invitation to enter into the private office for the purpose of transacting business, and the fact that plaintiff may have entered said office without any special invitation would of itself give defendant no right to assault or forcibly eject the plaintiff, *held*, erroneous. *Roberts v. Railroad*, 638.
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CARRIERS OF PASSENGERS—Continued.

43. **Same: Invitation to Enter Telegraph Office: Right to Eject.** A party who wishes to send a telegram at the office of the railway company, at a station where he is changing cars from one branch of defendant's railway to its main line, has no right to enter the office where the defendant's telegraph operator was engaged in performing the duties of his position, without an invitation to do so, and under certain circumstances the operator would have the right to eject a passenger or any other person from his private office, if they should remain against his will, provided he did not use unnecessary force. *Roberts v. Railroad*, 638.
44. **Same: Instructions: Ejection from Telegraph Office: Omission of Defendant's Evidence.** An instruction is prejudicial that leaves out of consideration defendant's evidence to the effect that plaintiff had been invited by the operator, while he was busy with his instrument, to leave, and that he would wait on plaintiff when he had time. *Ib.*
45. **Same: Death of Child: Statutory Rights of Parents: Refusal of Husband to Join.** The plaintiff's divorced husband executed a release to the defendant railroad company for his claim for damages for the death of their child, caused by the railroad's negligence, and refused to join with his wife in the action. Plaintiff then made her husband a party defendant, alleging as the reason therefor her husband's settlement with the defendant railroad. *Held*, that the provisions of section 2864, R. S. 1899, that "the father and mother" have a cause of action, and "may join in the suit," being in derogation of the common law, must be strictly construed, and that the language of the statute excluded the thought that either parent may have or prosecute a cause except in conjunction with the other, whatever may be the motive that actuates one of the parents in refusing to join as a party plaintiff. Hence, defendant's demurrer to the petition was rightly sustained. *Clark v. Railroad*, 689.

CERTIORARI. See County Courts, 1; Dramshops, 1.

1. **Certiorari: Purpose of Writ: Jurisdiction.** The office of the writ of certiorari is to give relief to an injured party when the court or body charged to have acted to his injury has proceeded without jurisdiction, or has exceeded its jurisdiction, or has rendered a judgment or made an order which it was not authorized by law to make. *State ex rel. v. Dykeman*, 416.
2. **Same: Appeal and Error.** A writ of certiorari can not be used as a substitute for appeal or writ of error. *Ib.*

CONCURRING NEGLIGENCE. See Carriers of Passengers, 8, 36.**CONSTITUTIONAL LAW. See Jurisdiction, 1, 2, 3, 4.****CONTAGIOUS DISEASES. See Pleading, 6.****CONTRACTS. See Carriers of Goods and Live Stock, 1, 2, 3, 5, 6; Corporations, 4; Equity, 1; Landlord and Tenant, 5; Releases, 1, 2; Statute of Frauds, 1, 2, 3, 4, 5, 6.**

CONTRACTS—Continued.

1. **Contracts: Joint and Several: Statute.** By the express provisions of section 2769, Revised Statutes 1909, all contracts which, by the common law, are joint only, shall be construed to be joint and several. *Knapp v. Hanley*, 169.
2. **Same: Employment: Fraternal Beneficiary Association: Authority of Officer: Ratification.** Where one employed by a fraternal order as organizer did not know of any want of authority on the part of the officer making the contract to make the duration of the contract extend beyond a designated date, and, in reliance on the terms of the contract, continued to perform the services after the designated date, and the governing body in charge of the affairs of the order either actually knew of the existence of the contract or had access to it as a part of the records of the order, and knew that the employee was performing the services in reliance on the contract, the order ratified the act of its officer in executing the contract, thereby entitling the employee to recover for the services rendered after the designated date. *Stevens v. Maccabees*, 196.
3. **Same: Existence: Sufficiency of Evidence.** Evidence *held* to justify a finding that a contract was not made between the parties. *Yancy v. Jones*, 206.
4. **Same: Written Contract: Pleading: Denial of Execution Under Oath.** Where plaintiff filed an account as a claim against an administratrix in the probate court for "legal services rendered," as per agreement to pay twenty per cent, but did not file any instrument in writing or copy thereof, as required by section 194, Revised Statutes 1909, on appeal to the circuit court, defendant was at liberty to contest the contract sued upon, although its execution was not denied under oath, since plaintiff did not bring himself within the provisions of the statute relating to written contracts by filing the original contract or a copy thereof. *Fenn v. Reber*, 219.
5. **Same: Executed by Both Parties.** Where a contract sued upon is signed by both parties, section 1985, Revised Statutes 1909, providing that when any petition shall be founded upon an instrument in writing, charged to have been executed by the other party and not alleged to be lost or destroyed, the execution of such instrument shall be adjudged confessed, unless the party charged to have executed the same deny the execution thereof under oath, does not apply. *Ib.*
6. **Same: Failure to Deny: Defenses Open.** In a suit on a written instrument, the failure of defendant to deny its execution under oath does not preclude all attack on it, but it may be resisted on the ground of illegality, failure of consideration, fraud, or even that it never existed. *Ib.*
7. **Same: Consideration: Prior Legal Obligation.** Although a promisor was under a prior legal obligation to perform the thing he agreed to perform in the later contract, if the later contract was more detrimental to him than the prior one, or put him under a broader obligation, the later contract is supported by a sufficient consideration. *Rollins v. Schawacker*, 284.
8. **Same: Assignments: Trusts and Trustees: Undue Influence: Setting Aside Transfer of Property.** Plaintiff, a storekeeper, became heavily in debt and much worried over his business,

CONTRACTS—Continued.

and at his request defendant took over his store as assignee for the benefit of the creditors, and later defendant purchased from plaintiff his equity in the stock of goods. Plaintiff subsequently sued to set aside the alleged assignment for the benefit of the creditors and the transfer of his equity to defendant on the grounds that the transactions were made at a time when he was not responsible mentally and that he had been unduly influenced by defendant, who occupied a judiciary position. The evidence being examined, *held* not sufficient to support the charge of fraud or undue influence, or to warrant the setting aside of the transfers made by plaintiff. *Heath v. Tucker*, 356.

9. **Same: Sales: Time Not Essence of.** In a replevin suit for possession of a cow which plaintiff claimed to have purchased, the defense was that plaintiff did not come after the cow at the time he agreed to. The evidence is examined and *held* not sufficient to show that the time plaintiff should call for the cow was of the essence of the contract. *Estes v. Harnden*, 381.
10. **Same: Time, When Essence of.** In determining whether the stipulations as to the time of performance of a contract of sale are conditions precedent, the court seeks to discover the intention of the parties, and if it appears from the language used and the circumstances that time was to be of the essence of the contract, stipulations in regard to it will be held conditions precedent. *Ib.*
11. **Same: Plea on Merits: Waiver.** The provision of a contract for the sale of grain, that all differences be submitted to arbitration, is waived by a plea to the merits. *Barnett and O'Neal v. Grain Co.*, 458.
12. **Same: Demand Drafts: Notice.** Demand drafts must be presented to the drawee, notice by mail or telephone that they are in the hands of a third person for collection not being sufficient. This rule, however, is subject to variation according to the usage of a bank and its customers. *Ib.*
13. **Same: Cancellation.** Where the breach of a contract is insignificant in respect to the delay in payment of drafts after notice, defendant having sustained but small damages thereby, the latter is not justified in declaring the contract cancelled. *Ib.*
14. **Same: Custom: Damages.** If the custom for ascertaining damages for violations of contracts for the sale of grain, is in conflict with the laws of the state, it would not apply, where the contract provides that it shall be subject in every respect to interpretation under the laws of this state. *Ib.*
15. **Same: Damages: Measure of.** Where consequential damages are not sought, the proper measure of damage, in an action for breach of a contract for the sale of grain, is the difference between the contract price of the grain and the price at which a like amount at the time, provided in the contract, could have been purchased in the market the day after they received notice of defendant's intention to cancel the contract. *Ib.*

CONTRIBUTORY NEGLIGENCE. See *Carriers of Passengers*, 18, 21, 22; *Death, Wrongful*, 13; *Municipal Corporations*, 1; *Negligence*, 12; *Personal Injuries*, 3; *Practice, Appellate*, 38.

CONVERSION. See *Partnership*, 6, 7.

1. **Conversion: Cutting Timber: Mistake: Willful Trespass: Measure of Damages.** Defendant cut timber from plaintiff's land, made the same into railroad ties and removed the ties from the land. In an action for conversion the rule for fixing the measure of damages is declared to be that if the timber was taken by honest mistake, then the measure of damages is the value of the timber before being cut, but if defendant knew he had no right to it and thus became the willful trespasser, then the measure of damages is the value of the timber in its improved condition without reduction for labor bestowed or expense incurred by the wrongdoer. *Sligo Furnace Co. v. Tie Co.*, 442.
2. **Same: Evidence Not Sufficient to Show Good Faith.** In an action for conversion it appeared that defendant had cut timber from plaintiff's land and made it into railroad ties. The defendant claimed and the trial court found that the timber was cut in good faith under an honest mistake of the defendant's agents that the land belonged to defendant. The evidence on this question is examined and *held* that there was no substantial evidence tending to show that defendant's agents acted in good faith. *Ib.*

CORPORATIONS.

1. **Corporations: Stockholder's Liability: Motion for Execution: Statute.** A proceeding by motion for execution against a stockholder of a corporation, under section 3004, Revised Statutes 1909, is a summary proceeding and a statutory substitute for a bill in equity; the statute contemplating a hearing and determination of the motion by the court without a jury, as in a suit in equity, and the cause on appeal being subject to review in the same manner as cases in equity. *Construction Co. v. Westen*, 185.
2. **Same: Stockholder's Liability: Motion for Execution: Estoppel.** In a proceeding by motion for execution against a stockholder of a corporation, under section 3004, Revised Statutes 1909, where the evidence tended to show that a concession taken as part payment of the capital stock was not over-valued, and that the creditor at the time he entered into the contract with the corporation, had knowledge of its financial condition and of the manner in which its stock had been sold, paid for and issued, he was estopped from asserting any liability against stockholders on account of any unpaid part of their subscription. *Ib.*
3. **Same: Fully Paid Stock.** A creditor of a corporation may not enforce liability against a stockholder who purchased in the open market stock represented on its face to be fully paid without any knowledge on his part of any facts which would put him on inquiry that the representation was not true. *Ib.*
4. **Same: Contracts: Failure to Affix Seal.** That the seal of a corporation was not affixed to a contract made by it is not in itself fatal to the contract. *Stevens v. Maccabees*, 196.

CORPORATIONS—Continued.

5. **Same: Stock: Sale: Consideration.** A corporation was organized in Texas by three men. The capital stock was \$10,000, divided into 100 shares, each of \$100 par value. Only \$500 was paid in cash. The stock was issued to the three incorporators in about equal amounts and was, by their order, marked "paid up and non-assessable." Afterwards one of them bought one of the other's stock; and after that he and the third one entered into a written contract whereby the third one also sold his stock, for which he gave his promissory notes. In a suit on the notes it was held that the transfer of the stock was a sufficient consideration for the notes. *Bucklew v. Pyron*, 673.
6. **Same: Stockholders, Inter se: Creditors.** Though the law declares that all issue of corporate stock is void unless it is paid up in full, yet, where the contest is between the organizing stockholders who issue the stock without its being paid up, the stock is not void. But otherwise as to creditors or non-consenting stockholders. *Ib.*
7. **Same: Notes for Purchase Money: Consideration.** If stock is issued without being paid up and notes are given by one stockholder to another for stock, in order that the purchaser may have full control of the corporation, which is a going concern, and he thereby becomes possessed of all the stock and runs and manages the corporation, receiving all the profits of the business, he will not be allowed to say the sale was void and afforded no consideration for notes given for the purchase money. *Ib.*

COSTS. See *Interplea*, 7.

COUNTY COURTS. See *Dramshops*, 1.

County Courts: Jurisdiction: Revoking Dramshop License: General Finding: Certiorari. In a proceeding before a county court to revoke a dramshop keeper's license on the grounds that he conducted a disorderly house, a general finding that he conducted a disorderly house is sufficient, and where the specific findings upon which it is based are set out in the record of the county court and such specific findings are not inconsistent with the general finding, the general finding will not be disturbed in the certiorari proceeding. *State ex rel. v. Dykeman*, 416.

COURTS.

Courts: Records: Under Orders of Judge. Nothing can become part of the record of the court unless ordered to be made so by the judge then holding the court and presiding therein, in whom rests the sole power over the court's records. *Fenn v. Reber*, 219.

CREDITORS. See *Corporations*, 6; *Trusts*, 3, 4, 5.

CREDITORS' BILL. See *Trusts*, 4.

Creditors' Bill: Equity: Not Necessary to First Reduce Claim to Judgment, When: Trusts. Where the defendant is a nonresident, and has no property in the state subject to legal process, but is possessed of an equitable estate, plaintiff may seek in equity

CREDITORS' BILL—Continued.

to sequester the income therefrom without first obtaining a judgment at law and endeavoring to collect the same. *Heaton v. Dickson*, 312.

CRIMES AND PUNISHMENTS. See Physicians and Surgeons, 1.

1. **Crimes and Punishments: Conclusiveness of Finding.** A judgment of conviction, in a criminal prosecution, is conclusive, although there is only slight evidence to support it. *State v. Roswell*, 338.
2. **Same: Necessity of Proving Ownership.** To constitute "larceny," the thing stolen must be the property of another; but either general or special ownership may be sufficient. *Ib.*
3. **Same: Necessity of Proving Ownership as Laid.** Ownership of property stolen must be proved as charged, except that there may be an immaterial variance under the statute. *Ib.*
4. **Same.** To convict of larceny of money from a pocketbook, ownership of the money must be proved as charged; proof of ownership of the pocketbook being insufficient. *Ib.*
5. **Same: Evidence: Presumptions.** The presumption of accused's innocence of stealing money of a particular person from a pocketbook cannot be overthrown by a presumption that that person owned the money because it was in the pocketbook shown to be his. *Ib.*
6. **Same: Evidence: Presumptions of Innocence: Presumption Against Presumption.** It being presumed by the law that all persons are innocent of the offense charged, until facts or circumstances affording a legitimate inference to the contrary are shown, one may not be convicted of a crime upon a mere *prima facie* case established through the medium of presumptions, raised by the law, since one presumption of that character will not be allowed to overthrow or destroy the effect of the presumption of innocence. *Ib.*

DAMAGES. See Conversion, 1; Death, Wrongful, 5, 6, 7, 8, 9, 10, 11, 12, 15; Evidence, 14; Instructions, 8; Personal Injuries, 1; Slander and Libel, 5, 16.

1. **Damages: Instructions: Correct in General Scope: Necessity of Asking Limiting Instruction.** An instruction on the measure of damages is not erroneous because general, if it is correct as far as it goes; and a party desiring a more specific instruction must request it in proper form. *Voelker v. Constructing Co.*, 1.
2. **Same: Pleading: Loss of Earnings.** In an action for personal injuries, the petition averred that "said injuries did prevent, and will continue to prevent, plaintiff from fully exercising and conducting his business as heretofore." The testimony showed that plaintiff owned a coal and ice business, to which he gave his personal attention, and that by reason of his injuries he was unable to perform the work required by said business, necessitating the sale thereof. *Held*, the averments of the petition were sufficient to authorize a recovery for loss of earnings, since, under the facts stated, plain-

DAMAGES—Continued.

tiff's earnings were the result of his labors rather than of invested capital. *Brandt v. Railroad*, 16.

3. **Same: Instructions: No Evidence.** In an action for damages to personal property, an instruction on the measure of damages submitting elements of damages not supported by the evidence is erroneous. *Cehman v. Portmann*, 240.
4. **Same: Personal Injuries: Verdict Not Excessive.** A verdict for \$1500 was held not excessive where it awarded plaintiff, a woman, who sustained injuries while a passenger on a street car which resulted in slight paralysis of the bowels and injury to the stomach, so that she could not properly digest her food, and also caused constant pain and a nervous condition. *Witty v. Traction Co.*, 429.
5. **Same: Trespass: Distinguished from Malicious Attachment.** In an action for trespass *vi et armis* for willfully, maliciously and wrongfully levying upon plaintiff's goods, where the plaintiff corporation was not a party to the original attachment suit by virtue of which the levy was made, it was error to instruct the jury that they might take into consideration, in assessing compensatory damages, the value and amount of money and time expended by the corporation in defending said attachment suit. *Coffee and Spice Co. v. Welborn*, 647.
6. **Same: Punitive: Trespass.** Where, in another action to which the plaintiff corporation was not a party, the defendant caused the constable to seize plaintiff's goods, knowing that they were its property, the act was wrongful, intentional, and malicious, provided the jury so found, and an instruction, in this action by the plaintiff corporation for trespass *vi et armis*, that the jury might allow punitive damages was proper. *Ib.*

DEATH, WRONGFUL.

1. **Death, Wrongful: Negligence: Evidence: Causal Connection: How Established.** While, in an action for death resulting from negligence, it is necessary for plaintiff to not only prove negligence but that decedent's death resulted therefrom and that the causal connection be established by the evidence and not rest upon speculation and conjecture, still it is sufficient if the facts proved are of such nature and are so connected and related to each other that the causal connection may be fairly inferred from them. *Voelker v. Constructing Co.*, 1.
2. **Same: Falling Into Unguarded Excavation: Evidence: Statements of Deceased: Right of Jury to Disregard.** In an action for death resulting from decedent's falling into an unlighted and unguarded excavation, the jury were justified in attributing a statement made by decedent to persons who found him in the excavation that he had been shot and thrown into the excavation, when an examination of his body disclosed that he had not been shot, to a disordered condition of his mind, due to his injury. *Ib.*
3. **Same: Presumptions.** In an action for death resulting from decedent's falling into an unlighted and unguarded excavation, the law presumes decedent did not commit suicide, and if the surroundings did not indicate how he came to be in the excavation, the presumption is that it was without design. *Ib.*

DEATH, WRONGFUL—Continued.

4. **Same: Negligence: Falling Into Unguarded Excavation: Sufficiency of Evidence.** In an action against a contractor, who excavated in a street in the space reserved for the sidewalk and who failed to erect barriers or maintain warning lights, as required by a city ordinance, for the death of a pedestrian who fell into the excavation, evidence *held* to justify a finding that decedent met his death by falling into the excavation while walking on the street and that the negligence of defendant in failing to guard the excavation and maintain warning lights thereat was the proximate cause of decedent's death. *Ib.*
5. **Same: Action by Wife: Damages: Instructions.** In an action by a wife for the negligent death of her husband, an instruction that the jury may assess her damages at such sum as they believe will compensate her for her husband's death, not exceeding a specified sum, is sufficient, in the absence of a request for a more specific instruction. *Ib.*
6. **Same: Action by Wife: Damages: Elements of Damages: Instructions.** In an action by the wife for the death of her husband, resulting from negligence, it is not necessary for plaintiff to prove what the earnings of decedent were, to avoid being limited to nominal damages, since the personal attention of her husband to insure her comfort and the many ways in which he might make himself helpful and useful to her should be taken into consideration in measuring her loss, and for such loss she is entitled to substantial damages, without any showing as to decedent's earnings. *Ib.*
7. **Same: Loss of Society.** In an action by a wife for the death of her husband, resulting from negligence, the wife is not entitled to recover for loss of her husband's society. *Ib.*
8. **Same: Evidence: Presumptions: Instructions.** In an action by a wife for the death of her husband resulting from negligence, the law presumes that decedent was industrious and sober, treated his family tenderly and properly, and contributed sufficiently toward their support, so that a requested instruction limiting plaintiff's recovery to nominal damages, if the jury believed plaintiff failed to prove decedent had performed such duties, was properly refused. *Ib.*
9. **Same: Failure of Husband to Perform Duties.** In an action by a wife for the death of her husband, resulting from negligence, although the husband had not performed the duties of treating his family tenderly and properly and contributing sufficiently toward their support, the wife had a right to the performance of such duties by the husband, and her recovery is not to be limited to nominal damages where that right is negligently destroyed. *Ib.*
10. **Same.** A wife suing for the death of her husband, resulting from negligence, may recover for the loss of the personal attention and usefulness of her husband, and for having to assume the burden of a father's care in the education and support of minor children of the marriage, without showing his fortune, earnings, or capacity to earn, or his habits, or treatment of his family, and without showing, to any degree of exactness, his age or the state of his health. *Ib.*

DEATH, WRONGFUL—Continued.

11. **Same: Discretion of Jury.** In an action by a wife for the death of her husband, resulting from negligence, the award of damages is largely, if not altogether, conjectural, nor subject to even approximate admeasurement, and injuries and not confined to any exact mathematical calculation, but are vested with considerable discretion, with which the courts will not interfere, unless it has been abused. *Voelker v. Construction Co.*, 1.
12. **Same: Excessive Verdict.** In an action by a wife for the death of her husband, resulting from negligence, the evidence showed that decedent was employed as agent for an insurance company; that he had a child ten years old and another child whose age was not stated. *Held*, that while the age and state of health of decedent could not be accurately inferred, still it might be inferred he was not extremely old or seriously disabled and had some degree of life expectancy, and that a verdict for \$3500 was not so large as to shock the sense of justice, although the life expectancy of deceased might not appear to be very great. *Ib.*
13. **Same: Negligence: Contributory Negligence: Intoxication of Decedent: Instructions.** An instruction, in an action for the death of a person falling into an unguarded excavation in a sidewalk, that if decedent directly contributed to his death by his own negligence there could be no recovery, and that if he fell into the excavation while intoxicated and the intoxication directly contributed to the accident and the injury would not have occurred but for the intoxication, the verdict must be for defendant, properly submitted the issue of contributory negligence. *Ib.*
14. **Same: Self-Defense: Question for Jury.** Where defendant is sued for damages for killing plaintiff's husband admits the killing and justifies on the ground of self-defense, whether his evidence is sufficient to sustain his plea of justification is a question for the jury. *Brinkman v. Gottenstroeter*, 351.
15. **Damages: Surviving Children.** In a suit for damages for killing plaintiff's husband the jury, in determining the amount of damages, had the right to take into consideration the evidence that deceased had left minor children for the plaintiff to support. *Ib.*

DEBTOR AND CREDITOR.

- Debtor and Creditor: Loans: Retaining Part of Loan to Await Perfecting of Title.** Plaintiff applied to defendant, an agent for a loan company, for a loan of \$2000 on certain real estate to secure the loan. In his application for the loan he agreed to furnish an abstract showing perfect title in him to the real estate. It appeared that the title was defective. The agent advanced part of the loan to take up a prior mortgage, but held back the remainder until the title could be perfected. In a suit by plaintiff for this balance it is held that plaintiff could not recover without showing a perfect title, even though the loan company had collected interest on the full amount, but whether the loan company was entitled to recover the interest on the face of the loan is not decided. *Peters v. Carroll*, 375.

DEEDS OF TRUST.

1. **Deeds of Trust: Sale: Purchase by Trustee or Cestui que Trust.** Where a deed conveyed the legal title of land to plaintiff as trustee, and vested the beneficial estate in her and her three children as tenants in common, and where subsequently one of the sons purchased his brother's interest, and plaintiff purchased the interest of the other son, the result of these transactions left the legal title to the land vested in plaintiff with the entire equitable estate vested in plaintiff and her son as tenants in common, since one *cestui que trust* may convey his interest to another, and since, while the law always looks with suspicion on a purchase by a trustee of a beneficial interest in the property, such a transaction will be sustained where there is no suggestion of fraud, and no complaint was ever made by the vendor. *Murry v. King*, 710.
2. **Same: Proceeds.** Where a trustee who was also tenant in common of the beneficiary estate, with her son, sold the farm, which was the subject of the trust, the entire proceeds being received and retained by the son, who used his mother's share of the money as her agent with her knowledge and consent for her benefit, the radical changes wrought by these transactions were the exchange of places as trustee; the change of the subject of the trust from the farm to the money of the mother; and the fact that the trust was no longer evidenced and controlled by the original deed under which the farm was conveyed in trust to the mother, but was to be controlled by the terms of the oral agreement between mother and son at the time the son, as trustee, received the fund. *Ib.*
3. **Same: Parole Trust of Personality: Parole Proof.** Although there is no direct evidence of a trust agreement, where the circumstances tending to show the existence of a trust are definite and certain, respecting the subject-matter, parties, and purpose, and are clear and convincing to the mind of the court, a parole trust of personal property may be created, and its existence proved by parole testimony. *Ib.*
4. **Same: Pleadings: Proof: Variance.** There is substantial conformity between allegation and proof where the averment that the farm "was sold by said son acting for himself and plaintiff," and that he retained the entire proceeds of sale, is shown by the evidence to be literally true, although plaintiff was the trustee, and theoretically made the sale by a deed in consummation of the transaction conducted by her son as her agent for their common benefit. *Ib.*
5. **Same.** In an action by the mother to enforce a parole trust of personality arising from the proceeds of the sale of the land which she had held as trustee, and the beneficial estate of which had been vested in herself and son, as tenants in common, an averment that plaintiff and her son were joint owners and tenants in common of the land, correctly stated their relationship to each other and the extent of their respective interests in the proceeds of the land. *Ib.*
6. **Same: Beneficiary: Estate of Trustee.** Where the son received the proceeds from the sale of land through the medium of the active co-operation of the mother, who was trustee of the land, and in a manner to show that plaintiff, the mother, as

DEEDS OF TRUST—Continued.

trustee, was disposing of the proceeds in the way prescribed by the trust, and was paying to the son his beneficial part, and, in addition, making him the custodian and trustee of her own part, plaintiff can maintain an action in her individual capacity as beneficiary of the trust fund against the estate of the trustee. *Murry v. King*, 710.

7. **Same: Statute of Limitations: Continuing Trust.** Where the evidence clearly shows that a continuing parole trust was created, neither laches nor limitations would begin to run against it until the death of one of the parties; or until there was a demand for the fund by the *cestui que trust* and a repudiation by the trustee. *Ib.*

DEPOSITIONS. See Evidence, 2.

Depositions: Admissibility in Evidence: Absence of Deponent: Evidence. Where it is shown that a witness is a traveler, very slight evidence is sufficient to establish his absence from the jurisdiction, and testimony of a witness that he inquired at the residence of the deposing witness and was informed he was in another city was sufficient, in the absence of any counter-vailing testimony, to admit the deposition, and evidence of the occupation of the deposing witness and that he was at a place where his occupation would require him to be was sufficient to justify the trial court in assuming, for the purpose of admitting his deposition, that he was absent in the course of his business and not by the consent, connivance or collusion of the party offering his deposition. *Rollins v. Schawacker*, 284.

DISORDERLY HOUSE. See Dramshops, 2, 3; Words and Phrases, 1.

DRAMSHOPS.

1. **Dramshops: Revoking License: Authority of County Court: Certiorari.** A county court revoked the dramshop license of relators for keeping a disorderly house in violation of section 3012, Revised Statutes 1899. This order was sought to be revoked by certiorari proceedings in the circuit court and upon failing these relators appealed to the appellate court. *Held*, that on such appeal only the certified record could be examined and it appearing by a fair construction thereof that the county court acted within its authority in revoking the license, the order must stand. *State ex rel. v. Dykeman*, 416.
2. **Same: Disorderly House: Selling Liquor on Sunday.** Selling liquor on Sunday on one occasion is not, standing alone, sufficient to authorize a county court to revoke a dramshop keeper's license on the grounds that he kept a disorderly house. *Ib.*
3. **Same: Bawdy House Above Dramshop.** Where dramshop keepers rented the room above their saloon to be used as a bawdy house, and said room was connected with the saloon by a dumb waiter for conveying liquor to the inmates and frequenters of the house, *held*, that the county court was justified in finding that the dramshop keepers were guilty of keeping a disorderly house in violation of section 3012, Revised Statutes 1899. *Ib.*

EQUITY. See Creditors' Bill, 1; *Lis Pendens*, 1; Trustees, 5.

1. **Equity: Action to Rescind Contract: Plaintiff Must Show Diligence.** When one comes into a court of equity to rescind a contract, he must be able to show as a primary condition to his right to rescind, that he has been prompt and diligent in disavowing the obligation into which he alleges he was fraudulently led. *Heath v. Tucker*, 356.
2. **Same: Specific Performance: Discretion of Court.** Specific performance of a contract is not awarded by a court of equity as a matter of right, but rests in the sound discretion of the court, and whether it would be granted or withheld in a given case must be determined by the facts of that case, and one of the requisites to the granting of such relief is the absence of an adequate remedy at law. *Dazey v. Laurence*, 435.
3. **Same: Adequate Legal Remedy: Burden of Proof.** In a suit in equity to have a lien declared on real estate, where plaintiff would not be entitled to the relief sought if he has an adequate remedy at law, the burden will be upon plaintiff to show that defendant was insolvent, so that a money judgment could not be collected on execution, when to grant the relief demanded would result in loss to the purchaser of the land in question who brought in good faith and without actual knowledge of plaintiff's claim. *Ib.*

ESTATES BY THE ENTIRETY. See Mechanics' Liens, 3, 4.

1. **Estates by the Entirety: Personal Property: Married Woman's Statute.** Estates by the entirety exist in personal property in Missouri, unaffected by the statute giving the wife sole control and disposition of her property as though a *femme sole*. That statute did not interfere with or alter such estate. *Craig v. Bradley*, 586.
2. **Same: Note to Husband and Wife: Sale of Real Estate.** Where a husband and wife owned land by the entirety and sold it, taking a note for the purchase money, in the name of both, they have in it an estate by the entirety, and upon the death of the husband, she as survivor remained the owner of the whole note; and upon her death her administrator could recover it of his administrator. *Ib.*
3. **Same: Bank Accounts.** Where two bank accounts, in different banks, opened by the husband and made up of deposits by him, were kept in the name of the husband and wife, the intention being that the survivor should have all, and he died; it was *held* that the accounts were estates by the entirety and upon the husband's death the wife remained the owner as survivor. *Ib.*
4. **Same: Joint Note: Consideration from Two Persons.** Where a note was taken by husband and wife for borrowed money, a part of which was advanced by the wife for that purpose from her separate means, and the balance by the husband; it was *held* to be an estate by the entirety, and that the wife remained the full owner as survivor after the husband's death. *Ib.*

ESTOPPEL. See Attorneys, 12; Corporations, 2.

ESTOPPEL—Continued.

Estoppel: Partnership: Action for Accounting: Position Taken in Pleadings. Where in a suit for an accounting between two of the partners of a firm, plaintiff both in his bill and in his proof insisted that defendant have credit on the account as finally stated for the total amount of plaintiff's indebtedness to another firm, of which defendant was a member, it was error for the court to refuse to give defendant the benefit of such credit, though he was not otherwise entitled thereto. *Grier v. Strother*, 292.

EVIDENCE. See Bills and Notes, 2, 3, 4, 8; Carriers of Goods and Live-Stock, 1, 2, 3, 7, 8, 12; Carriers of Passengers 11, 24, 38, 44; Crimes and Punishment, 5, 6; Damages, 3; Death, Wrongful, 1, 2, 3, 4, 8; Depositions, 1; Instructions 6, 7, 8; Life Insurance 12; Personal Injuries, 1; Practice, Appellate, 5, 6, 7, 13, 16, 33, 35, 38; Practice, Trial, 1, 3; Railroads, 4; Slander and Libel, 3.

1. **Evidence: Motives, Feelings and Instincts.** In all cases touching the conduct of men, motives, feelings and natural instincts are allowed to have their weight and to constitute evidence for the consideration of courts and juries. *Voelker v. Construction Co.*, 1.
2. **Same: Impeachment: Signed Deposition: Competency.** Where, though a deposition was not filed in a cause, it conclusively appeared to have been given by plaintiff and signed by her after hearing it read, any statement therein tending to contradict material statements made by her at the trial were competent to be received in evidence. *Chalmer v. Railway*, 55.
3. **Same: Cumulative.** Where extrajudicial declarations made by plaintiff are erroneously excluded, the error is harmless if defendant succeeds in eliciting the same statements from plaintiff while she is a witness. *Ib.*
4. **Same: Suit for Goods Purchased: Irrelevant Evidence.** In an action against an administrator for a diamond sold decedent, testimony was admitted on behalf of defendant, upon the promise of his counsel to make its relevancy appear later, that about the time decedent purchased a diamond stud for \$630, charged for in the account sued on, a certain woman had purchased a diamond ring at about the same price, and defendant's counsel was further permitted to ask plaintiff's secretary on cross-examination whether in the probate court he did not identify a receipted bill given to said woman, which showed that a diamond stud had been purchased by her for \$630 and had been paid for by her by eight installments, corresponding in amounts and dates with eight credits shown on decedent's account, and on a denial by said witness of such identification, defendant was permitted to show by another witness that plaintiff's secretary had identified said receipt. *Held*, that said evidence was not relevant. *Pierce Loan Co. v. Killian*, 106.
5. **Same: Conflicting Statements Made by Witness: Question for Jury.** Where the testimony of a party is conflicting with itself, and his testimony is the sole testimony in the case, the question which version of the transaction given by him is correct is for the jury. *Guthrell v. Slater*, 214.

EVIDENCE—Continued.

6. **Same: Judicial Notice: Personnel of Court.** The appellate court may take judicial notice of what judges were serving as judges of a circuit court under its jurisdiction, but may not take judicial notice of the length of time a particular judge was assigned to a particular division of court nor which of a number of judges was presiding in a particular division. *Fenn v. Reber*, 219.
7. **Same: Circuit Court, City of St. Louis: Rotation of Judges Among Divisions.** The appellate court will take judicial notice that the rule of rotation among the judges of the circuit court of the city of St. Louis prevails, under section 4149, Revised Statutes 1909, which provides that the judges of that court shall rotate in service between the nine divisions for the trial of civil cases and the three divisions for the trial of criminal cases, and that the result of sending three of the judges of the civil divisions to the criminal divisions necessarily involves a rotation of the judges among the civil divisions. *Ib.*
8. **Same: Judicial Notice: Tenure of Office of Circuit Judge.** The appellate court will take judicial notice that a certain circuit judge was elected for a term of office which had not expired. *Ib.*
9. **Same: Secondary Evidence: Notice to Produce Document Need Not Be Renewed: Trial Practice.** Where plaintiff gave defendant, at a term previous to that at which the case was tried, notice to produce a receipt given by plaintiff to defendant at the day set for trial at such term, or at such time as the cause might be tried, the cause having been continued from term to term, the notice was sufficient to entitle plaintiff to give secondary evidence of its contents, on failure to produce, without a renewal of the notice. *Rollins v. Schawacker*, 284.
10. **Same: Destruction of Original.** Where an original document is shown to have been destroyed while in the hands of defendant, secondary evidence of its contents may be given by plaintiff without giving defendant notice to produce the original. *Ib.*
11. **Same: Reputation: Specific Acts of Immorality.** It is not permissible to attack the reputation or character of a party by undertaking to show specific acts of immorality. *Rose v. Tholborn*, 408.
12. **Same: Negligence: Defective Sidewalks: Evidence of Condition.** In a suit for damages against a city for injury received by plaintiff in falling over a loose board in a sidewalk, *held*, that in showing the condition of the sidewalk at place of the injury plaintiff should not be restricted to the particular board, yet the testimony should be restricted to the condition of the walk in the immediate vicinity of the injury, and that it was error to admit evidence showing the condition of the walk along the entire block. *McNeil v. Cape Girardeau*, 424.
13. **Same: Evidence of Other Accidents.** In a suit for damages for personal injuries received by plaintiff in tripping over a loose board in a sidewalk, although it is competent for witnesses to testify as to the condition of the walk at or near

EVIDENCE—Continued.

the place of the injury, and to permit them to state that the boards had tipped up when they were passing over the walk, as tending to explain how they knew the boards were loose, yet it was error and prejudicial to defendant's case to permit them to testify that in passing over this walk they had tripped on the loose boards and fallen by reason thereof. *McNeill v. Cape Girardeau*, 424.

14. **Same: Damages.** Where it had been agreed that a suit against a street railway company for damages for personal injuries should abide by the decision of the Court of Appeals in a similar case pending in the appellate court on the question of the company's liability, it was not error to read such stipulation and the mandate of the appellate court to the jury, where neither showed the amount of the judgment in the case decided by the Court of Appeals, and the only question before the jury being the amount of damages plaintiff was entitled to recover. *Witty v. Traction Co.*, 429.
15. **Same: Expert Testimony: Hypothetical Questions: Personal Injuries.** A hypothetical question propounded to a physician, testifying as an expert, submitted the inquiry of the effect upon a woman passenger resulting from being thrown out of a seat in a street car with force and violence, alighting upon the floor and striking the lower end of her spine. *Held* proper and not subject to the objections that it was not based upon the facts proven, nor sufficiently broad so that an opinion could be predicated upon it. *Ib.*
16. **Same: Expert Evidence: Personal Injuries.** A physician may testify as to the probable results of a described injury or may detail the causes which produce a certain described condition. *Ib.*
17. **Same: Admission of Vice-Principal: Res Gestae.** The admission of defendant's general passenger agent, in a subsequent conversation with plaintiff, that the company was always having trouble with their agent who committed the assault on plaintiff was offered in proof. *Held*, that such evidence was incompetent under the rule that declarations of an agent in relation to a matter within the scope of his agency are admissible only when made at the time of the occurrence to which they relate. *Roberts v. Railroad*, 638.
18. **Same: Semble.** It seems that the rule ought to be that the statements of the vice-principal of a corporation ought to be admissible whether they be a part of the *res gestae* or not, as otherwise there would be two different rules governing the admission of evidence as to a given transaction in which the discrimination is in favor of the corporation and against the natural person. *Ib.*

EXECUTORS AND ADMINISTRATORS.

1. **Executors and Administrators: Appellate Practice: Validity of Probate Court's Judgments.** The administratrices objected in the probate court to the allowance of an order to pay a demand previously allowed by the court, and assigned to the sixth class, the only ground of their objection being "that said demand has already been paid in full." From a verdict in

EXECUTORS AND ADMINISTRATORS—Continued.

favor of the estate, the claimant appealed to the circuit court, where the court, without the aid of a jury, rendered judgment in claimant's favor, and ordered the probate court to direct the administratrices to pay claimant out of the assets so much of his claim as it may be entitled to under the law. *Held*, on appeal from this judgment, that the objections to the validity of the judgment of the probate court, allowing and classifying the demand, are not within the scope of the present proceeding. *Dooley v. Ryan*, 669.

2. **Same.** Where the administratrices failed to prosecute an appeal from the judgment of the probate court, allowing and classifying a demand, the validity of that judgment can not be questioned in the circuit court on an appeal from the verdict of a jury in the probate court where the only issue tendered by the administratrices was payment. *Ib.*
3. **Same: Judgment: Erroneous Recital.** Although the judgment of the circuit court erroneously recited that the demand was assigned by the probate court to the fifth (instead of the sixth) class, where such a judgment does not purport to change the classification, the error should be disregarded as a mere inadvertence. *Ib.*

FIRE INSURANCE.

1. **Fire Insurance: Agency: General Distinguished from Special Agent.** In the agency contract, defendant fire insurance company curtailed the authority of its agent to that of a mere solicitor of insurance who was only to be intrusted with the receipt of applications for insurance, and premiums therefor. The policy on its face, however, contemplated that a sale of the property might be made while the insurance was in force. There were no provisions in the policy that the endorsement of the company must be made by any particular officer. In addition to taking the applications for policies, and collecting premiums, the agent countersigned all policies issued through his office and delivered them. *Held*, that the agency of defendant's solicitor was general rather than special in view of the provisions of section 7995, R. S. 1899 (section 7047, R. S. 1909) that "foreign companies admitted to do business in this state shall make contracts of insurance only by lawfully constituted and resident agents, who shall countersign all policies so issued." *Sheets v. Insurance Co.*, 620.
2. **Same: Statutes: Construction of Section 7047, R. S. 1909.** One of the main purposes of section 7795, R. S. 1899 (section 7047, R. S. 1909) was to put a stop to the irritating and unjust practices indulged in by some insurers of adroitly phrasing their agency contracts in a way to bestow general powers upon their agents when such powers relate to the benefits flowing to the company, and to invest such agents with no power to represent the company when the benefits of the insured are involved. *Ib.*
3. **Same.** Under the provisions of section 7995, R. S. 1899, (section 7047, R. S. 1909) countersigning resident agents of foreign fire insurance companies are presumed to possess authority to make contracts of insurance for the principals, and defendant is estopped from disputing such authority. *Ib.*

FIRE INSURANCE—Continued.

4. **Same: Increase of Insurance: No Forfeiture.** Where additional fire insurance was taken out with the knowledge and consent of the local agent of the defendant, a foreign insurance company, and such additional insurance did not increase the total insurance beyond the limit fixed by the "rider" attached to the policy, the proposition that the increase of the insurance was in direct violation of the contract, and that the forfeiture of the policy was the penalty imposed, must be ruled against defendant. *Sheets v. Insurance Co.*, 620.
5. **Same: Alienation Clause: Sale in Course of Business.** A sale in bulk of goods worth \$400 out of a stock valued at \$9000 was a sale made in the course of business from stocks of merchandise to which the alienation clause of a fire insurance policy was not intended to apply, because such a sale would not materially enhance the risk. *Ib.*

FIXTURES. See *Landlord and Tenant*, 1, 2, 3, 4, 5, 6.

FORFEITURE. See *Fire Insurance*, 4; *Fraternal Beneficiary Associations*, 1, 2, 3, 4, 5, 6, 7, 8, 17, 19; *Life Insurance*, 4, 14.

Forfeiture: Not Favored: Notice. Forfeitures are not favored in the law and are, therefore, not to be allowed unless it appears that the party whose rights are sought to be thus summarily determined against him has had such reasonable notice as the law requires. *Bange v. Legion of Honor*, 154.

FRATERNAL BENEFICIARY ASSOCIATIONS. See *Contracts*, 2.

1. **Fraternal Beneficiary Associations: Non-Payment of Assessments: Forfeiture: Notice.** The laws of a fraternal beneficiary association required that every member should pay assessments within thirty days from the call; that a failure to do so before the first meeting of his council after the expiration of the thirty days operated to suspend the member, except that any council, by a majority vote, might authorize the payment of the member's assessment as a loan or gift from its funds, such payments being made within the thirty days specified. *Held*, that where a local council declined to pay a member's assessment under a call, though having paid several prior assessments, such declination did not of itself forfeit the member's certificate, unless he had notice that the call had been made or received notice of the forfeiture and acquiesced therein. *Bange v. Legion of Honor*, 154.
2. **Same: Non-Payment of Assessment: Forfeiture: Notice: Question for Jury.** Whether a notice of an assessment on mutual benefit certificates was mailed to the insured's regular address as required by the policy, *held* for the jury. *Ib.*
3. **Same: Instructions.** In an action against a fraternal beneficiary association, where insured, at the time the certificate was issued, resided in St. Louis, but afterwards went to Chicago, where he remained for some time seeking employment, an instruction that if insured's regular address at the time the call was made, for the non-payment of which he was suspended, was in Chicago, and not in St. Louis, where the notice was sent, yet if the notice of the call and suspension were forwarded to and received by insured in Chicago or actual notice thereof

FRATERNAL BENEFICIARY ASSOCIATIONS—Continued.

reached him, prior to his death and in time for him to have made application for reinstatement as a member, then the verdict should be for defendant, was erroneous for failing to instruct that, in the event the jury believed the notice was not mailed to insured's regular address, they must find that he actually received the same within the thirty days prescribed for payment by the company's by-laws, before a verdict for defendant would be proper. *Ib.*

4. **Same: Erroneously Addressed.** Where the insured receives notice of an assessment levied by a fraternal beneficiary association in time to pay the same within the time prescribed by the by-laws, the fact that the notice was erroneously addressed would be immaterial. *Ib.*
5. **Same.** Where notice of an assessment levied by a fraternal beneficiary association is not mailed to the regular address of the insured, he ought not to be declared in default unless he received it in time to have paid the assessment within the time prescribed by the by-laws; for the mere deposit of a notice in the mail is insufficient when it is not mailed to the regular address of insured. *Ib.*
6. **Same: Waiver.** Where a fraternal beneficiary association was sued on a certificate, and relied exclusively on a forfeiture for the non-payment of a particular assessment after notice, and the judgment rendered was reversed on appeal, defendant would not on retrial be permitted to claim a forfeiture on the further ground on non-payment of a specified per capita tax. *Ib.*
7. **Same: Forfeiture: Waiver.** Where the insurer, while in possession of all the facts, omits to invoke a forfeiture and induces the beneficiary to enter upon the expenditure of a considerable sum of money or to materially change his position by litigating another matter relied upon as a defense, it waives the forfeiture. *Ib.*
8. **Same: Consent Necessary to Subsequent Invocation.** And such forfeiture, having once been waived, may not thereafter be invoked without consent. *Ib.*
9. **Same: Change of Beneficiary.** The insured in a certificate issued by a fraternal beneficiary association may change the beneficiary without the consent of the latter, in the absence of prohibition by statute, or by the charter or by-laws of the association, or by the terms of the certificate. *Eves v. Woodmen*, 247.
10. **Same: Policy for Benefit of Married Women: Statutes: Not Retrospective in Operation.** The amendments changing section 5854, Revised Statutes 1889, to the form in which it appears as section 6944, Revised Statutes 1909, are not retrospective in their operation. *Ib.*
11. **Same: Statute Construed.** Under section 5854, Revised Statutes 1889, where no power of divestiture is reserved the wife and children of insured, named as beneficiaries in a life insurance policy, have a vested right therein. *Ib.*

FRATERNAL BENEFICIARY ASSOCIATIONS—Continued.

12. **Same: Policy of Benefit of Married Women: Statute Construed.** Under section 5854, Revised Statutes 1889, where no power of divestiture is reserved to a member of a beneficiary association by the constitution or laws of the association or by the terms of the certificate, there would seem to be no reason for holding that the wife and children of such member, named in the certificate as beneficiaries, would not have a vested right therein. *Eves v. Woodmen*, 247.
13. **Same: Policy for Benefit of Married Women: Statute: Construction.** In determining whether section 5854, Revised Statutes 1889, makes a policy of life insurance inure to the wife, subject to such power of divestiture or substitution as may be contained in the contract, or whether it denies the right to reserve such power, it is the duty of the courts to uphold the contract, if it can be done, and effect still to be given to the law, as courts will not abridge the freedom of contract without cause. *Ib.*
14. **Same: Change of Beneficiary: Statute Construed.** Section 5854, Revised Statutes 1889, declaring that "any policy of insurance made by any insurance company on the life of any person, expressed to be for the benefit of any married woman shall inure to her separate use and benefit" leaves the parties to a life insurance policy free to contract as they please in regard to the beneficiary and the quality of her interest, and does not deny the power to reserve in the policy the right to reserve the power to revoke the rights of the wife as beneficiary and substitute another in her stead. *Ib.*
15. **Same: Policy for Benefit of Married Women: Change of Beneficiary: Statute.** Even if section 5854, Revised Statutes 1889 is applicable to a certificate issued by a fraternal beneficiary association because it was issued before the association qualified to do business under Acts of 1897, page 132, it does not prevent the member changing the beneficiary from his wife to his sister, where the constitution and by-laws of the association, made part of the certificate, provide that a member may make such a change; said section not denying the right to reserve in the certificate the power to change the beneficiary from the wife to another person. *Ib.*
16. **Same: Benefit Certificates.** A benefit certificate, as originally issued by the Loyal Knights, a fraternal benefit society, provided for the payment at death of ten times the total amount he should pay into the mortuary fund of the society, not to exceed two thousand dollars. Later a "rider" was issued, increasing the benefits to twenty-three times the amount so paid. Thereafter, the holder transferred membership to another similar association. Death ensued, and this action was brought on said certificate. *Held*, that as the contract of assumption between the latter association and the deceased member provided for payment as set out in the original certificate, the full measure of plaintiff's recovery was ten times the monthly mortuary assessments paid by the member, and it was immaterial whether the "rider" was legally adopted or not. *Hatcher v. Annuity Ass'n*, 538.
17. **Same: Forfeitures.** The contract between the deceased husband of plaintiff, and the defendant, a fraternal beneficiary as-

FRATERNAL BENEFICIARY ASSOCIATIONS—Continued.

sociation, contained stipulations that provided automatically for his suspension from membership, and the forfeiture of his insurance, if he failed to pay his dues within a stated and very limited period. Deceased failed to pay such charges for at least five months. Defendant, however, failed to give notice of assessments, and timely notice of a suspension of deceased. The defendant's local lodge moreover assured plaintiff that pursuant to a custom authorized by defendant, no suspension or forfeiture would be declared during her husband's illness. *Held*, although but for these facts, the delinquency of the husband would have *ipso facto* destroyed his membership, and forfeited his beneficiary certificate, defendant could not declare a forfeiture on account of the non-payment of such charges, at least until it had notified the husband of its decision to carry him no longer, and had given him a reasonable opportunity to pay his arrearages. *Britt v. Woodmen*, 698.

18. **Same: Notice of Assessments.** Where defendant elected to treat regular fixed assessments as assessments to be levied by the sovereign camp in the form and manner prescribed for levying irregular assessments, it should be held to its own characterization of the assessments in controversy, and since it treated them as special assessments, they should be so regarded and defendant should be held to the performance of the stipulation requiring the giving of notice. *Ib.*
19. **Same: Forfeitures: Repudiation of Lodge's Custom.** Where, pursuant to a uniform custom known to and approved by the sovereign camp, the local lodge assured plaintiff that her husband's assessments and dues would be paid during his illness, it would be shocking to conscience to permit defendant to repudiate that agreement at a time when the defendant saw that a loss was impending and when it was too late for the member to help himself. *Ib.*

GARNISHMENTS. See *Practice Appellate*, 43.

GUARDIAN AND WARD. See *Parent and Child*, 1.

HUMANITARIAN DOCTRINE. See *Carriers of Passengers*, 17, 19, 20, 23, 26; *Practice, Appellate*, 37, 39.

Humanitarian Doctrine: Admission Against Interest. Plaintiff's testimony, under the humanitarian doctrine that he was giving due attention to his way, and that he looked in the direction of the train causing the injury when at a place only ten or eleven feet from the danger line, is in the nature of an admission against his own interest. This evidence, coupled with the fact that there is no evidence tending to show an appearance of peril, until plaintiff actually entered on the path of the train made it error to overrule defendant's request for a peremptory instruction. *Pennell v. Railroad*, 566.

HUSBAND AND WIFE.

Husband and Wife: Trustee: Wife's Act. If the husband takes the wife's separate money, without her consent, in writing, as provided by statute, and invests it in notes or real estate, taking the deed or the notes in the name of both, he does not

HUSBAND AND WIFE—Continued.

hold by an estate in the entirety, but will be considered as a trustee for the amount of her money. But this rule does not prevent the wife performing the transaction herself so as to create such an estate. *Craig v. Bradley*, 586.

INDICTMENTS AND INFORMATIONS. See *Malicious Prosecution*, 1, 4; *Physicians and Surgeons*, 1.

INFANT. See *Slander and Libel*, 10, 11, 12, 13.

INJUNCTIONS. See *Roads and Highways*, 1; *Slander and Libel*, 4.

Injunctions: Right to Injunction. A court of equity will not grant an injunction except on clearest proof. *Yancy v. Jones*, 206.

INSTRUCTIONS. See *Carriers of Passengers*, 15, 16, 17, 33, 40, 41, 42, 44; *Damages*, 1, 3; *Death, Wrongful*, 5; *Fraternal Beneficiary Associations*, 3; *Intoxicating Liquors*, 4; *Municipal Corporations*, 2, 3, 4; *Negligence*, 9, 10; *Principal and Agent*, 1; *Railroads*, 3; *Real Estate Agents*, 3, 4; *Slander and Libel*, 14.

1. **Instructions: Refusal.** Where unsound principles of law are incorporated in a requested instruction, it is not error to refuse it or to fail to give a correct instruction. *Voelker v. Construction Co.*, 1.
2. **Same: Refusal: Covered by Other Instructions.** It is not error to refuse a requested instruction embodied in instructions given by the court of its own motion. *Id.*
3. **Same: Inconsistent Instructions.** Instructions must be in harmony with each other, and if it appears that those given for one side are sound in doctrine, and those for the other are in conflict therewith as to grounds of recovery or defense, the verdict must be set aside if it is in favor of the party for whom the erroneous instruction is given, unless on all the proof it appears that the verdict is for the right party. *Kelley v. Railway*, 114.
4. **Same: Tests for Determining Correctness: Confusing Instructions.** The test of the correctness of instructions lies not in the close analysis which a critical lawyer, or an appellate court, with the aid of briefs and arguments, gives to them, but is how they will be understood by the average juror. When instructions are so involved as to cloud the real issue and to require careful and critical examination on the part of the trial and appellate court to determine their meaning or the inferences which may be drawn from them, the very object of giving instructions to the jury is defeated and, in determining the sufficiency of a series of instructions, the question is, whether the jury were either misdirected or lacking in proper direction, or so directed as to necessarily confuse them in arriving at a correct solution of the issues. *Knapp v. Hanley*, 169.
5. **Same: Refusal: Abstract Instructions: Principal and Agent: Joint Agency.** In an action to secure one-half of certain com-

INSTRUCTIONS—Continued.

missions received by defendant for the sale of corporate stock, where plaintiff alleged that he and defendant had been jointly employed to sell said stock and had agreed to divide equally the compensation received therefor, and that the owner of the stock had paid plaintiff one-half of the amount of the agreed compensation, an instruction offered by plaintiff, declaring that if one of two persons jointly engaged in the performance of certain work has received the full compensation paid for the services, the law does not permit him to say that he intended to deceive his co-worker by making a secret agreement by which he alone should receive compensation, but in such case the law treats all such secret action, as inuring to the benefit of both parties, and requires that the money received, in the absence of any agreement or understanding to the contrary between the parties, shall be equally divided between them, was properly refused as being a mere abstraction and as not stating the facts hypothetically and applying the abstract propositions of law to such facts. *Ib.*

6. **Same: Singling Out Evidence: Attorney and Client: Action for Services.** In an action by an attorney against a client for alleged services, an instruction directing the jury to find for plaintiff if they believed from the evidence that he had been consulted by defendant and requested by him to do certain things and that plaintiff had rendered the services referred to in his testimony, was not erroneous, as the reference to plaintiff's testimony was merely a method of identifying that element of his evidence and had no tendency to attach undue importance thereto nor to disparage the testimony of defendant's witnesses. *Rollins v. Schawacker*, 284.
7. **Same: Must be Based on Evidence.** In a suit for damages for killing plaintiff's husband, it appeared that defendant was an officer, but there was no evidence that at the time of the killing he was acting or pretending to act in his official capacity. *Held*, that it was not error for the court to ignore in its instructions the fact that defendant was an officer, and his rights in the premises as such. *Brinkman v. Gottenstroeter*, 351.
8. **Same: Personal Injuries: Damages: Impairment of Earning and Labor Capacity: Evidence.** In a suit for damages for personal injuries, plaintiff was a married woman and the evidence did not show that prior to the injury plaintiff had been earning anything. *Held*, that it was improper to instruct the jury that in estimating her damages they should assess a reasonable compensation for any permanent impairment of plaintiff's earning capacity. *Held, further*, that it was proper to instruct the jury they might take into consideration the impairment of plaintiff's capacity to perform labor. *McNeill v. Cape Girardeau*, 424.
9. **Same.** Where an instruction, when read as a whole, clearly and correctly defines the duty of defendant, it is not permissible to select isolated parts thereof, and infer that the jury disregarded the remainder, and were misled by what would be error in the selected part if it were not qualified by its context. *Kelley v. Kansas City*, 484.
10. **Same: Curing Error.** While in another instruction, also given at plaintiff's request, the court declared the law correctly,

INSTRUCTIONS—Continued.

this did not cure the error in giving the first instruction which contained a glaring misdirection, because the two instructions left it to the jury to say what was, and what was not, the law of the case. *McGee v. Railway*, 492.

INTERPLEA. See Attorneys, 5.

1. **Interplea: Grounds.** The essential purpose of a bill of interpleader is to protect the indifferent holder of a fund or the bailee of an article from the annoyance and expense of separate actions to recover what he is willing to pay; and the bill lies when the same fund, debt, or thing, is claimed by hostile parties through adverse titles derived from a common source, provided the interpleader is a mere stakeholder, with no interest in the subject-matter, and has not incurred any liability to either of the claimants personally. *United Railways v. O'Connor*, 128.
2. **Same: Exclusive Right to Fund in One Defendant.** Where it appears from a bill of interpleader that one defendant has a valid right to the fund and it appears affirmatively that the other defendant is without any right thereto, no ground for the bill exists. *Ib.*
3. **Same: Requisites.** A bill of interpleader should show not only the willingness of plaintiff as stakeholder to render the debt or duty to the rightful claimant, but it should show that he is ignorant or in doubt which is the rightful claimant, and that he is in danger, by reason of such doubt, from their conflicting demands, and where it shows on its face that one of the claimants is certainly entitled to the fund as against the other claimant, it is insufficient on demurrer. *Ib.*
4. **Same: Scope of Remedy: Contractual Relations Between Beneficiary and Client.** The mere fact that a contractual relation exists between the complainant and one of the claimants to a fund under which the fund is required to be paid to such claimant does not of itself defeat the right of interpleader where there is privity between the claimants. *Love v. Insurance Co.*, 144.
5. **Same: Scope of Remedy: Independent Liability.** The right of interpleader does not exist where the party seeking the relief has placed himself under an independent liability to either of the claimants, beyond the liability which arises from the title to the property or fund in controversy. *Ib.*
6. **Same: Beneficiary and Assignee of Life Insurance Policy.** The insured and beneficiary assigned life insurance policies to a creditor, the assignment being consented to by the insurer, who agreed in writing to pay the creditor, upon the death of the insured, the amount of his insurable interest. After the death of the insured, the assignee brought suit to recover the amount of the policies, but the insurer interpleaded, claiming that the original beneficiary was still asserting a right to a part of the proceeds of the policies, tendered the amount of the policies into court, and averred that it had no interest in the matter, other than the payment of the amount to the person rightfully entitled to it, and was thereupon discharged. *Held*, that there was privity between the claimants, who each derived

INTERPLEA—Continued.

their rights from the same contracts of insurance made by the defendant with the insured, and that the defendant had a right of interpleader. *Ib.*

7. **Same: Costs: Discretion of Court: Appellate Practice: Fraternal Beneficiary Associations.** Where in a suit on a benefit certificate issued by a fraternal beneficiary association, the claimant of the benefit, as a substituted beneficiary, is required to interplead, and the suit proceeds between plaintiff and the interpleader, the taxation of the cost of the suit against the fund, instead of against plaintiff, on judgment being rendered for the interpleader, was a matter within the sound discretion of the trial court, with the exercise of which the appellate court will not interfere. *Eves v. Woodmen*, 247.

INTOXICATING LIQUORS.

1. **Intoxicating Liquors: Prescription: Date.** A prescription, to authorize a druggist to sell intoxicating liquor, must be dated, and a date in these words is sufficient: "Rocheport, Missouri, Date June 21-9," under a charge for selling on that day in the year 1909. *State v. Chinn*, 611.
2. **Same: Substantial Compliance.** Where the statute requires a prescription to authorize a sale of intoxicating liquor and that such prescription shall state that it is prescribed as a necessary remedy, a prescription reading: "Whiskey as a necessary remedy," is sufficient. The omission of the words "prescribed as," will not invalidate it. *Ib.*
3. **Same: Signing Prescription: Knowledge.** It is not necessary that a purchaser of liquor of a druggist under a prescription, should see the physician sign it or know that it was signed. If signed before, or at time of sale, it is sufficient. Whether any one saw it signed is of no consequence. *Ib.*
4. **Same: Instructions: Comment.** Instructions commenting on the evidence and directing special attention to certain parts, are erroneous. And an instruction submitting a hypothesis of which there is no evidence, is improper. *Ib.*

JUDGMENTS. See *Executors and Administrators*, 3; *Constitutional Law*, 4; *Mechanics' Liens*, 4; *Practice, Appellate*, 43; *Practice, Trial*, 5.

Judgments: Final Judgment: Dissolution of Partnership. A decree dissolving a partnership and appointing a receiver to distribute the assets is a final decree, and leaves nothing to do but to execute it by administering the partnership estate. *Hemm v. Juede*, 259.

JUDICIAL NOTICE. See *Evidence*, 6, 7, 8.

JURISDICTION. See *County Courts*, 1.

1. **Jurisdiction: Court of Appeals: Federal Constitution Invoked.** Under section 12, article 6, Constitution of Missouri, and section 5 of the Amendment thereto of 1884, giving the Supreme Court jurisdiction in cases involving the construction of the state or Federal Constitution, the Court of Appeals is without

JURISDICTION—Continued.

- jurisdiction of a cause where a question open for consideration involving the construction of the Federal Constitution is properly presented by the record. *Applegate v. Insurance Co.*, 63.
2. **Same: Constitutional Question: Effect of Previous Adjudication.** The Court of Appeals has jurisdiction to determine a case in which a constitutional question is raised, when such question has been settled by the adjudications of the Supreme Court. *Ib.*
 3. **Same: Life Insurance: Constitutionality of Section 6945.** It having been determined by both the Federal and state Supreme Courts that section 6945, Revised Statutes 1909, which provides that suicide shall be no defense to an action on a life insurance policy, is not violative of the Fourteenth Amendment to the Federal Constitution, that question is no longer an open one in this state, so that the Court of Appeals has jurisdiction of an appeal, although that question was raised by appellant in the court below. *Ib.*
 4. **Same: Arising on Judgment of Lower Court: Review.** Whether a constitutional question is presented for the determination of the appellate court, when such question arises for the first time on the decision or judgment of the lower court, is not very clear, under the decisions of the Supreme Court of this state, but it is settled in the affirmative by the decisions of the Federal Supreme Court. *Ib.*
 5. **Same: Effect of Appeal: Appellate Practice.** An appeal divests the trial court of jurisdiction of the cause and places it in the appellate court. *State ex rel. v. Sale*, 273.
 6. **Same: Effect of Appeal: Appellate Practice.** Whatever a judgment appealed from covers, the appeal embraces and the jurisdiction of the trial court over all matters so covered and embraces is suspended pending the appeal; but matters in the cause independent of and distinct from the questions involved in the appeal are not taken from the jurisdiction of the trial court by the appeal. *Ib.*
 7. **Same: Effect of Appeal: Right to File Intervening Petition, Pending Appeal: Mandamus.** Pending an action of Riefing against two partners for damages, one partner brought suit against the other for dissolution of the partnership, in which suit a receiver was appointed. Thereafter, one of the partners was adjudged a bankrupt and his trustee filed a petition in the dissolution suit for an order on the receiver to pay to him his bankrupt's half of the partnership assets, which over the opposition of the other partner, was granted, and the other partner appealed. Thereafter, Riefing having obtained judgment in his action, filed an intervening petition in the dissolution suit, praying for an order on the receiver requiring him to pay said judgment out of the assets in his hands. *Held*, that while the trial court was without jurisdiction to set aside the order appealed from, it had jurisdiction to entertain Riefing's petition, and that mandamus would lie to compel it to entertain the same, the appeal involving only the right of the trustee, as against the other partner, to have the bankrupt's share of the partnership assets, while Riefing's right if existing at all, was against all of them. *Ib.*

JURY.

Jury: Misconduct: Talking to Witness: New Trial. One of the grounds assigned in the motion for a new trial was the misconduct of a juror in talking to a witness while the trial was in progress. Both juror and witness made affidavits that the case was in no way mentioned in their conversation. The trial court overruled the motion for a new trial. *Held*, that there was no reason for the appellate court to interfere. *Rose v. Tholborn*, 408.

JURY QUESTION. See *Carriers of Passengers*, 39; *Evidence*, 5; *Fraternal Beneficiary Associations*, 2; *Negligence*, 5, 8, 11, 12; *Releases*, 3.

JUSTICES OF THE PEACE.

LANDLORD AND TENANT.

1. **Landlord and Tenant: Mines and Mining: Tenant's Right to Remove Improvements.** Plaintiff instituted suit to recover possession of certain mining machinery, consisting of a sludge table, dummy elevator and gas pipe, claiming the same under a chattel mortgage from one of the defendants. The appellant had a mining lease upon the land on which the machinery was located and claimed the machinery under a sublease with the same defendant, by the terms of which all improvements and repairs necessary to keep the plant in good running order and repair, which were made by said defendant, were to become the property of appellant. *Held*, under the evidence that the sludge table, etc., were not improvements and repairs put on the property by the subtenant in order to keep the plant in good running order and therefore appellant was not entitled to retain the same. *Hardware Co. v. Lead & Zinc Co.*, 387.
2. **Same.** Where a lessee under a mining lease erects a mining plant and installs machinery for the purpose of mining, cleaning and preparing ore for market, it had the right to remove the same at the end of the term in the absence of a contract to the contrary. *Ib.*
3. **Same: Fixtures: Tenant's Right to Remove Improvements.** The common-law rule relating to fixtures and improvements put upon property by a tenant has been relaxed, and what would be a fixture as between vendor and vendee, or mortgagor and mortgagee, would not be between landlord and tenant. *Ib.*
4. **Same.** The law is liberal toward tenants who make improvements for their own particular use, which can be removed without substantial injury to the rented premises. *Ib.*
5. **Same: Contracts: Construction.** Covenants restricting the tenant's ordinary right to remove trade fixtures are always strictly construed. *Ib.*
6. **Same: Removing Fixtures: Waiving Matter of Removal Within Reasonable Time.** When a demand was made by the plaintiff upon the appellant for the possession of certain mining machinery and fixtures, the appellant claimed to be the owner of the property under a mining lease with its tenant and refused to deliver possession upon such grounds. *Held*, that after suit by plaintiff for possession appellant is in no position to

LANDLORD AND TENANT—Continued.

urge that plaintiff forfeited its right to the property by not removing the same within a reasonable time after the expiration of the lease. *Hardware Co. v. Lead & Zinc Co.*, 387.

7. **Same: Trespass.** Where a landlord enters the premises against the objections of the tenant, with the intention to cut and haul away some hay in which he had a share, and goes into the meadow on two or three succeeding days for that purpose and cuts and hauls the hay away, he commits a trespass but is not guilty of forcible entry and detainer. *Kimble v. McDermott*, 605.

LARCENY. See *State v. Roswell*, 338.

LIBEL. See *Slander and Libel*.

LICENSES. See *County Courts*, 1; *Dramshops*, 1, 2, 3.

Licenses: Dramshop License: Not a Contract: Police Power. A license to sell liquor is in no sense a contract with the state, but a mere permit to do an act that would otherwise be unlawful and is subject at all times to the police power of the state. *State ex rel. v. Dykeman*, 416.

LIFE INSURANCE. See *Jurisdiction*, 3.

1. **Life Insurance: Suicide: Statute.** Under section 6945, Revised Statutes 1909, declaring that suicide shall be no defense to an action on a life insurance, the suicide of insured does not give a cause of action, but a cause of action arises on the policy, as interpreted by the statute, by reason of the death of insured, this interpretation being, that when the death of insured occurs from suicide, the beneficiary shall recover the full amount of the insurance. *Applegate v. Insurance Co.*, 63.
2. **Same: Applies to Accident Policy.** Section 6945, Revised Statutes 1909, declaring that suicide shall be no defense to an action on a life insurance policy, applies to a suit on an accident policy insuring against death from bodily injuries effected through external, violent and accidental means within ninety days from the date of the injuries. *Ib.*
3. **Same: Facts Stated.** An accident insurance policy provided that insurer would pay the beneficiary a stipulated sum in the event of the death of insured effected through external, violent and accidental means within ninety days from the date of the injuries, and that in the event of the death of insured, caused by poison, insurer should pay only one-tenth of the amount otherwise payable. Insured committed suicide by taking poison. In an action to recover the full amount of the insurance, defendant pleaded it was liable for one-tenth of the amount only, for the reason its liability was so limited in the policy, in the event of death by poison. *Held*, that under section 6945, Revised Statutes 1909, insurer was liable for the full amount sued for, since the policy, as interpreted by the statute, provides that when death occurs from suicide, whether accomplished by poison or otherwise, the beneficiary shall recover the full amount insured for. *Ib.*
4. **Same: Forfeiture for Non-Payment of Premiums: Statutes: Construction of Technical Terms.** In construing section 7897, Revised Statutes 1899, which provides that policies of insurance

LIFE INSURANCE—Continued.

on life shall not be forfeited by reason of non-payment of premiums where three-fourths of the net value of the policy is sufficient to secure temporary insurance, etc., "net value" is a technical term, and is to be taken in its technical sense. *Rose v. Insurance Co.*, 90.

5. **Same: Net Value.** "Net value" or "reserve," in life insurance, existed long before either by contract or statute any part of it was devoted to extended insurance. *Ib.*
6. **Same: Premiums: Cost of Insurance Defined.** The cost of insurance for a single year of insured life is the sum which the company must actually receive from the insured and augment with interest in order to meet the probability of insured dying during that year, according to the mortality table, and such cost is greater with increasing age, because the probability of death grows greater. *Ib.*
7. **Same: "Net Value": Defined.** The "net value" of a life insurance policy is the accumulation of the balance of past net premiums not absorbed in carrying the risk. *Ib.*
8. **Same: Statute.** The "net value" of a policy of life insurance, under section 7897, Revised Statutes 1899, represents nothing but premiums actually collected from the policy-holder in excess of the tabular costs up to the time of default with interest added at the rate of four per cent per annum compound. *Ib.*
9. **Same: Gross and Net Premiums Defined.** The "net premium" in a life insurance policy is the amount required to be paid by insured to meet the tabular cost and is figured to be the exact amount required to carry the insurance from period to period. "Gross premium" is the amount actually charged by the insurer under the contract, and usually exceeds the net premium by the addition of a certain "loading" for the profit and expenses of the company. *Ib.*
10. **Same: Net Value: Gross Premiums to Be Applied.** All money received by an insurance company as gross premiums on a life insurance policy must be applied toward the payment of the net level premium—that is, the tabular cost of insurance and the creation of the reserve which the form or class of the policy makes proper—before any part may be appropriated by the company for profit or expense. *Ib.*
11. **Same: Method of Computing: Statute.** In computing the net value of a life insurance policy, under section 7897, Revised Statutes 1899, the policy must not, contrary to its terms, be treated as an "ordinary whole life policy" in which the premiums are level and fixed and payable at set intervals throughout the continuance of the risk. *Ib.*
12. **Same: Evidence: Based on False Promises.** In an action on a life insurance policy, under section 7898, Revised Statutes 1899, providing for non-forfeiture because of lapse, etc., the evidence of an actuary as to the net value of a policy, based upon computations founded on an erroneous construction of the statute's requirements as to the elements of the computation, was wholly worthless. *Ib.*

LIFE INSURANCE—Continued.

13. **Same: Method of Computing.** The net value of a life insurance policy is not greater in proportion to the smallness of the premium because the insured receives a greater benefit for his money, and the same reasoning applies to the departmental practice and the statutes intended to secure the solvency of insurance companies, such as section 6925, Revised Statutes 1909, which charges them as a liability with a reserve sufficient to meet all policy obligations and declares that if a policy does not provide for the payment of a sufficient net level premium to create a proper reserve, according to the form of the policy, the company shall supply the sufficiency out of its valuable assets. *Rose v. Insurance Co.*, 90.
14. **Same: Action on Policy: Forfeiture for Non-Payment of Premiums: Net Value Held Insufficient to Carry Policy.** In an action on a life insurance policy, prosecuted on the theory that, notwithstanding insured had defaulted in the payment of premiums, three-fourths of the net value of the policy at the time of the lapse was sufficient, when used as a single net premium, as contemplated by section 7897, Revised Statutes 1899, to provide temporary insurance to the time of insured's death, it is *held* the evidence did not establish that the policy had such value. *Ib.*

LIS PENDENS.

- Lis Pendens: Purchaser Without Actual Knowledge: Equity: Adequate Legal Remedy.** Plaintiff sued on account of a breach of contract for the sale of livery stock, under which contract one of the defendants had agreed to secure part of the purchase price by a mortgage on certain real estate, and the suit was to establish a lien on said land. A *lis pendens* was filed at the institution of the suit. Respondent asked to be made a party defendant before final judgment, claiming to be a purchaser of the land in good faith, for value and without actual knowledge of plaintiff's claim. *Held*, that the filing of the *lis pendens* would preclude respondent from holding the land against plaintiff, if to do so would work injury to plaintiff, but the plaintiff must show himself entitled to equitable relief and if the defendant, who breached the contract was solvent and a money judgment could be collected by execution, so that plaintiff had an adequate remedy at law, plaintiff would not be entitled to the lien as against respondent. *Dazey v. Laurence*, 435.

MALICIOUS PROSECUTION. See Pleading, 5.

1. **Malicious Prosecution: Pleading: Notice: Obtaining Indictment Improperly.** In an action for damages for malicious prosecution it is not necessary to allege or show that the indictment was obtained by false or fraudulent testimony, but if it was obtained by any other improper means or if the evidence shows that the prosecutor, notwithstanding the action of the grand jury, did not himself believe that defendant was guilty, but acted maliciously in making the charge, then he is liable. *Willkerson v. McGhee*, 343.
2. **Same.** If the defendant maliciously, and without probable cause, appeared before the grand jury and charged the plaintiff with a crime and caused witnesses to be subpoenaed and an indictment to be returned, it is not necessary for plaintiff to allege that the witnesses before the grand jury testified falsely. *Ib.*

MALICIOUS PROSECUTION—Continued.

3. **Same: Probable Cause.** Probable cause which would relieve the prosecutor from liability in an action for malicious prosecution is a belief by him in the guilt of the accused, based on circumstances sufficiently strong to induce such belief in the minds of reasonable and cautious men. *Ib.*
4. **Same: Indictment Prima Facie Evidence of Probable Cause.** The action of the grand jury in finding an indictment is prima facie evidence of probable cause, but this may be overthrown in an action for damages for malicious prosecution by showing that the defendant acted maliciously in appearing before the grand jury and charging plaintiff with the crime when he did not believe and had no probable cause for believing such charge. *Ib.*

MANDAMUS. See Jurisdiction, 7.

1. **Mandamus: Adequate Remedy at Law: Action to Require Receiver to Pay Fund: Bankruptcy Proceedings Inadequate.** To supersede the remedy by mandamus on the ground relator has an adequate remedy at law, such other remedy must be equally as convenient and effective as the proceeding by mandamus; and this is not the case where one seeks by mandamus to have a court compelled to entertain a petition to order a receiver appointed by it to pay a judgment out of the trust fund in his hands, one-half of which fund the court had previously ordered turned over to the trustee in bankruptcy of one of the two ultimate owners of it, from which order the other owner had appealed, since proceedings by the relator in the bankruptcy court, would be inadequate, because only part of the fund which relator claims could be found there, while the whole fund could be reached in the hands of the receiver. *State ex rel. v. Sale, 273.*
2. **Same: Pendency of Other Action.** The other action or proceeding involving the same question pendency of which will prevent issue of a writ of mandamus, must be one to which relator in mandamus is a party, or by which he may be bound. *Ib.*
3. **Same: Scope of Remedy.** In a proceeding by mandamus to compel a court to permit an intervening petition to be filed, matters relating to questions whether the petition should be sustained are for the lower court in the first instance and do not concern the appellate court upon the application for mandamus, where it is limited to commanding the lower court to move. *Ib.*

MARRIED WOMEN. See Estates by the Entirety, 1; Fraternal Beneficiary Associations, 10, 11, 12, 13, 15.**MECHANICS' LIENS.**

1. **Mechanics' Liens: Variance: Admissions at Trial.** Where the petition alleges a joint contract between the contractor and the two owners, who were tenants by the entirety, while the proof shows that the contract was made by only one of the owners, the husband, there was no variance when the contract as pleaded was admitted at the trial by counsel for defendants. *Sash & Door Co. v. Bradfield, 527.*

MECHANICS' LIENS—Continued.

2. **Same: Verification of Affidavit.** The addition to the signature of the official title of the affiant who appended the word "secretary" to his signature to the affidavit of lien should be regarded as merely descriptive, and therefore such an affidavit was sufficiently signed. *Sash & Door Co. v. Bradfield*, 527.
3. **Same: Notice: Service on One Tenant by the Entirety.** Where the notice of the sub-contractor of its intention to file a lien was served only on the husband, and not on the wife, they being tenants by the entirety, under the provisions of the statutes requiring service of notice on "the owner, owners, or agent," which are highly remedial, and should be given a liberal construction, *held*, that the statute contemplates that a lien shall not be lost through an honest mistake in ascertaining the names of all the owners. Hence, the notice was effective as to the estate of the husband. *Ib.*
4. **Same: Tenants by the Entirety: Separate Judgment.** Where the relations, to each other and to strangers, of defendants in a mechanic's lien, said defendants being tenants by the entirety, were subject to the provisions of the Married Woman's Act of 1889, each is "an owner" within the purview of the mechanics' liens statutes; and by contract may subject his or her estate to liens for improvements erected on the land. Hence, a judgment against the estate of the husband alone will be affirmed. *Ib.*

MINES AND MINING. See *Landlord and Tenant*, 1, 2.

MISTAKE. See *Conversion*, 1.

MUNICIPAL CORPORATIONS.

1. **Municipal Corporations: Contributory Negligence: Sidewalks.** In an action for damages for personal injuries sustained by stepping into a hole in a sidewalk negligently left unrepaired by the city, *held*, that plaintiff's conduct in conversing while walking along the street, and in not giving the sidewalk in question her undivided attention was not so negligent in law as to preclude recovery, providing plaintiff at the time was giving ordinary attention to her course. *Kelley v. Kansas City*, 484.
2. **Same: Negligence: Instructions: Sidewalks.** An objection that an instruction enlarged the issues made by the evidence, because it submitted to the jury the question whether or not the step in a sidewalk was defective, *held*, hypercritical when the hypothesis of the entire instruction, and the contention of the plaintiff throughout the case was that the hole in the end of the board (into which hole plaintiff fell), together with the step under the hole, constituted a dangerous defect. *Ib.*
3. **Same: Negligence: Instructions.** An instruction asked by defendant was properly refused which told the jury that if the injury was received at a place where there was a step down in the sidewalk of which plaintiff knew, then it was her duty in passing along the point in such sidewalk to have exercised a higher degree of care than was required of her in passing along a sidewalk where there was no such step down, because this would have held plaintiff to the exercise of extraordinary care. *Ib.*

MUNICIPAL CORPORATIONS—Continued.

4. **Same: Personal Injury: Sidewalks: Instruction: Duty of City.** In an action against a city for injuries resulting from falling on a sidewalk, it is error to instruct that it is the duty of the city to keep its walks in a reasonably safe condition. Such instruction should be that the duty is to make the effort that ordinary prudent persons would make to keep the walks in a reasonably safe condition. But such error is cured if followed by a proper qualification of the city's duty. *Forster v. Kansas City*, 504.
5. **Same: Pedestrians: Reasonable Care.** A pedestrian along one of the city's sidewalks, while he should not be heedless, is not required to assume that he is treading a dangerous and unsafe walk. *Ib.*
6. **Same: Parks and Boulevards: Taxbills: Certificate of Purchase.** In an action against the city for damages for the failure of its treasurer to perform the purely ministerial act of issuing a certificate to the purchaser at a sale of property under an assessment levied for the maintenance of parks and boulevards, *held*, that the city in levying the assessment was acting in a governmental and not in a ministerial capacity, and that plaintiff's cause of action was against the recalcitrant officer, and not against the municipality. *Brightwell v. Kansas City*, 519.
7. **Same.** State and municipal legislation relating to the establishment and maintenance in large cities of public parks, boulevards, and playgrounds is founded on the conviction that such institutions are a public necessity (just as streets, sewers, police, and fire protection are necessary to the general public welfare) and not mere utilities of special local value. *Ib.*
8. **Same: Sovereign Distinguished from Private Functions.** In planning parks and boulevards, in condemning the necessary land, and levying special taxes to pay for such land, the functions are those pertaining to sovereignty, but in the subsequent work required to convert raw land into parks and boulevards, the city acts in its private corporate capacity. *Ib.*
9. **Same: Legislative Distinguished from Ministerial Act.** In the characterization of a given municipal act, it is not enough to constitute such act legislative that it be found to relate in a general way to a function of government. If substantially it is of a local or corporate nature, it will be classed as ministerial. *Ib.*
10. **Same: Waterworks: Regulation of Rates by Ordinance: Meters.** By ordinance, the minimum water rate was raised five cents per thousand gallons, and a provision was inserted therein that the water company should make no rental charge for meters which it installed. Under the terms of the company's charter, the water rates could only be revised by a mutual agreement between the city and the water company. The company did not accept the entire proposition of the city. It did, however, put into effect the proposition for the meters, and threatened to remove them unless the consumers paid rental. *Held*, that, where the city is content with the remedy afforded by the judgment of the circuit court holding that the company had authority to charge consumers a rental for the use of its meters, but enjoining it from making any additional charge

MUNICIPAL CORPORATIONS—Continued.

for water, such judgment will be affirmed, although perhaps the city might have enjoined the company from charging rent for the use of its meters upon the theory that, having accepted and acted upon one part of the proposed rerating, it was estopped from denying the binding effect of the remaining part of the proposition. *Independence v. Waterworks Co.*, 693.

NEGLIGENCE. See *Carriers of Passengers*, 1, 3, 5, 6, 7, 10, 27, 29, 30, 31, 35; *Death, Wrongful*, 1, 2, 3, 4, 13; *Evidence*, 12, 13; *Municipal Corporations*, 2, 3; *Personal Injuries*, 3; *Pleading*, 6; *Railroads*, 2.

1. **Negligence: Existence of, Depends Upon Circumstances.** Negligence is a relative matter and must be determined from the circumstances of the particular case presented. *Brandt v. Railway*, 16.
2. **Same: Speed Ordinance.** A limitation by ordinance of a rate of speed at which cars may be operated is not necessarily authority to run the cars in all circumstances to the limit of the speed prescribed. *Ib.*
3. **Same: Excessive Speed.** Where the particular circumstances of the case present a situation suggesting danger, as a usual thing the operatives of street cars must conduct themselves with respect to the same as an ordinarily prudent person managing a dangerous agency would conduct himself in the same situation. *Ib.*
4. **Same: Speed of Twelve Miles per Hour.** Unless particular circumstances suggest some danger as a usual matter, the running of a street car at a rate of speed of twelve miles per hour is lawful, unless restrained by ordinance. *Ib.*
5. **Same: Collision at Crossing: Excessive Speed: Jury Question.** In an action for injuries sustained in a collision at a street crossing in a city, where people constantly move to and fro, between a vehicle driven by plaintiff and a street car operated by defendant, the circumstances in proof indicating a common use of the crossing, suggesting a possibility of injury more or less present as a usual thing, the question whether it was negligence to operate the car at a speed of twelve miles per hour was a question for the jury, although the maximum speed fixed by ordinance was fifteen miles per hour. *Ib.*
6. **Same: Right to Assume Speed Was Not Excessive.** A person in driving across street car tracks at a public crossing is justified in assuming that street cars will be operated at such place at a rate of speed within that which is usual on a clear track. *Ib.*
7. **Same: Res Ipsa Loquitur.** Where the thing which occasions the injury complained of is conclusively shown not to have been under the management or within the control of defendant, the doctrine of *res ipsa loquitur* does not obtain, but where the thing is shown to be under the management of defendant, or his servants, and the accident is such as under the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by defendant, that the accident arose from want of care. *Rice v. Railroad*, 35.

NEGLIGENCE—Continued.

8. **Same: Personal Injuries: Failing to Maintain Lights at Excavation: Jury Question.** Whether defendant street railway company was negligent in failing to place sufficient lights to properly guard an excavation in a street, or whether, having placed the lights, it negligently failed to keep the same burning during the entire night, as required by a city ordinance, *held* for the jury. *Kelley v. Railroad*, 114.
9. **Personal Injuries: Failing to Maintain Lights at Excavation: Instruction.** In an action for personal injuries received by falling into an excavation in a street, where a municipal ordinance counted on required not only that red lights should be placed at such excavations but that they should be kept burning during the entire night, an instruction that defendant was not liable if it placed or caused red lights to be placed at and along the excavation on the night of the accident, and before the accident occurred, was erroneous, since the ordinance required not only that red lights should be placed at the point in question but also that they should be kept burning during the entire night. *Ib.*
10. **Same.** In such a case, an instruction for plaintiff which informed the jury that the ordinance laid a duty on defendant not only to station lights at the excavation, but to keep them burning as well, and that if plaintiff came to her injury, while exercising due care on her part, because of defendant's omission to perform said duty, the finding should be for her was correct. *Ib.*
11. **Same: Injury by Tie Carelessly Handled on Street Crossing: Negligence, Question for Jury.** In an action for personal injuries alleged to have been sustained by plaintiff by reason of a tie, which was being precipitated into a trench on a street crossing, striking her, evidence *held* sufficient to prove defendant was negligent in precipitating the tie forward upon the crossing for pedestrians without making a careful observation to see whether persons were present who were likely to be injured thereby. *Rigby v. Transit Co.*, 330.
12. **Same: Contributory Negligence, Question for Jury.** In an action for personal injuries alleged to have been sustained by plaintiff by reason of a tie, which was being precipitated into a trench on a street crossing, striking her, *held*, evidence for defendant tending to show that plaintiff was fully aware that ties were being thrown into the trench, but nevertheless moved forward in the face of the impending danger, which was open to her view, was sufficient to prove plaintiff was remiss in her duty to exercise ordinary care. *Ib.*

NEW TRIAL. See Jury, 1. See Practice, Appellate; Real Estate Agents, 2.

1. **New Trial: Excessive Verdict: Setting Aside: Discretion of Court.** It is the positive duty of a trial judge to set aside the entire recovery, where he is convinced from what appeared at the trial that the verdict was the result of passion and prejudice on the part of the jury, and it is not necessary that he first suggest a proper remittitur by plaintiff. *Rigby v. Transit Co.*, 330.

NEW TRIAL—Continued.

2. **Same: Errors of Law.** While only one new trial may be awarded a party on the judgment of the trial court with respect to the facts of the case, matters of law are always open to review. *Rigby v. Transit Co.*, 330.

NONSUIT, MOTION FOR. See *Practice, Appellate*, 41.

NOTICE TO PRODUCE DOCUMENTS. See *Evidence*, 9.

NUISANCE. See *Roads and Highways*, 1.

PARENT AND CHILD. See *Ballments*, 2.

Parent and Child: Guardian and Ward: Natural Guardian: Right of Parent to Sue for Injury to Child's Property. Where a child derives title to property from her father, he is entitled to the custody thereof as her natural guardian and may sue for its injury under the express provisions of sections 403, 423, Revised Statutes 1909, and a recovery by him would inure to the benefit of his ward and would estop him from presenting a further demand as such guardian. *Oehmen v. Portmann*, 240.

PARKS AND BOULEVARDS. See *Municipal Corporations*, 6, 7, 8.

PARTNERSHIP. See *Estoppel*, 1; *Judgments*, 1.

1. **Partnership: Firm Assets: Rights of Partners.** In order to discharge himself from the liabilities to which he may be subject as a partner, a member of a firm has the right to have the partnership property applied in payment of the firm's debts, and this right exists not only against his partner but against all persons claiming through him, including his trustee in bankruptcy. *Hemm v. Juede*, 259.
2. **Same: Distribution.** Where the partners are in possession and control of the firm's property, they may make any honest disposition of it, and each may waive his equitable right to have it applied to the payment of firm debts, and consent to the application thereof to the payment of a partner's individual debts. *Ib.*
3. **Same: Rights of Partners: Administration of Estate by Court.** The court, in the administration of a partnership estate in a suit for the dissolution of the firm and the distribution of its estate, must apply the firm's assets to the satisfaction of the firm's creditors, to the exclusion of the individual creditors of the individual partners. *Ib.*
4. **Same: Facts Stated.** In an action by a partner for dissolution of the partnership and division of the assets between him and his copartner, after payment of the firm's debts, a decree dissolving the firm and appointing a receiver to distribute the proceeds of its assets equally between the partners, after deducting the cost of the proceeding, rendered on a stipulation permitting the appointment of a receiver to take charge of and dispose of the firm's assets and to report to the court from time to time, is not inconsistent with the idea that if partnership creditors presented claims before the funds were distributed, they should be paid; and while the funds are in the custody of the court, subject to its proper orders, the partner suing for the dissolution of the firm and the appointment of a receiver

PARTNERSHIP—Continued.

has not waived or lost his equitable right to have the firm's assets applied to the payment of the firm debts, and so long as there is any probability that a claim may be upheld as a firm liability, the court may not order the receiver to pay over to the trustee in bankruptcy of the copartner the share of the copartner in the firm's assets. *Ib.*

5. **Same: Dissolution: Liability of Outgoing Partner.** An outgoing partner, on dissolution of the firm, is not liable for the subsequent obligations of the continuing partner, after due notice has been given of the dissolution and of the partner's retirement. *Grier v. Strother*, 292.
6. **Same: Conversion of Property of Firm.** A partnership, consisting of three partners, *Grier*, *Strother* and *Shepard*, was dissolved by the withdrawal of *Strother*. After the dissolution, *Strother*, the withdrawing partner, took several yoke of oxen belonging to the partnership, and after using them for a few days, returned all but one animal to *Shepard*, who seemed to be the controlling spirit in the partnership. The animal which was not returned had suffered a broken leg and died. In an action for an accounting of partnership matters, brought against *Strother* by *Grier*, *held*, that *Strother* was not chargeable to plaintiff as for the conversion of all the cattle so taken, but was only bound to account to him for his one-third interest in the animal that died. *Ib.*
7. **Same.** A retiring member converting to his own use certain of the firm's property is liable to account for the interest of his partners therein. *Ib.*
8. **Same: Action for Accounting: Parties.** After the dissolution of a partnership, consisting of plaintiff, defendant and *Shepard*, the latter was discharged in bankruptcy, plaintiff sued defendant and *Shepard* for an accounting, but the suit was dismissed as to the latter, because of his bankruptcy. No point was made by plaintiff and defendant as to the propriety of the accounting being had when only two of the partners were before the court, but instead both parties insisted that their rights should be determined as between themselves. The trustee of *Shepard* made no claim to any right arising out of the partnership, and any possible litigation that might arise concerning the accounts of the firm, not included in the controversy between plaintiff and defendant, was barred by limitation. *Held*, that, though all the partners are, in general, necessary partners to a suit for an accounting, the joinder of *Shepard*, or his trustee, was not essential, under the circumstances, to a determination of the rights of plaintiff and defendant. *Ib.*
9. **Same: Trusts: Resulting Trusts.** A partnership, composed of *Grier*, *Strother* and *Shepard*, engaged in the business of operating a sawmill desired to purchase a tract of timber land for one thousand dollars. The firm had no money and *Grier* was unable to contribute his share of the purchase price, and *Strother*, and *Shepard* paid for the land and took a deed for themselves. The timber was sold by the partnership, after which the land was sold by *Strother* and *Shepard* for sixteen hundred dollars. In an action for an accounting brought by *Grier*, against *Strother*, *held*, that, while defendant and *Shepard* were trustees of the title for the firm, the firm was only entitled to share in

PARTNERSHIP—Continued.

the profits of the sale, to-wit, six hundred dollars, and hence plaintiff's interest in that transaction was one-third of that sum. *Grier v. Strother*, 292.

10. **Same: Joint Obligation: Set-off.** After dissolution of a firm, consisting of plaintiff, defendant, and Shepard, the latter became a bankrupt, and in a suit between plaintiff and defendant for an accounting, his rights were stipulated out of the case. *Held*, that, under such circumstances, plaintiff was not chargeable with two-thirds of the value of firm property converted by him, on the theory that the rights of Shepard inured to defendant, in trust for the account of Shepard, under section 1870, Revised Statutes 1909, providing that in all actions brought against one or more joint obligors or promisors, any debt or demand due from plaintiff to defendant in the action, or to all the obligors or promisors in the contract sued on, may be set off against the demand of plaintiff, but plaintiff was only chargeable with defendant's one-third interest in such property, since to apply the statute to this case, plaintiff would be required to respond for Shepard's interest in the property converted, when he and his rights were stipulated out of the case and the other matters involved in the accounting were considered on that basis. *Ib.*
11. **Same: Set-off: Indebtedness to Firm Against Individual Liability of Partner.** Plaintiff, defendant and one Shepard, were engaged in operating a mill as partners. Plaintiff sued defendant for an accounting, the suit being brought in part on the theory that he was responsible as the remaining solvent member of the firm of Shepard and Company, which became indebted to the bill partnership on account of its agency for the latter. Plaintiff was indebted to Shepard and Company in an amount greater than the latter's indebtedness to the mill partnership. *Held*, that equity required that defendant should receive credit at least to the extent plaintiff was indebted to Shepard and Company, but that he was not entitled to use the balance of plaintiff's indebtedness to that firm as an offset against defendant's personal liability to plaintiff, as an individual member of the mill company, under the rule that an account due a partnership cannot be offset against the debt of an individual member, and this notwithstanding defendant on selling his interest in both firms to Shepard reserved the individual account of plaintiff. *Ib.*
12. **Same: Dissolution of Partnership: Bankruptcy of Partner: Right of Partnership to Collect Debts.** While, by the bankruptcy of a partner, his share passes to his trustee in equity, the partnership continued *inter se*, to the extent at least of permitting it to collect outstanding debts. *Ib.*
13. **Same: Partnership Debt Against Individual Liability.** An accounting due a partnership may not be set off against the debt of one of the partners. *Ib.*

PERSONAL INJURIES. See *Evidence*, 15, 16; *Instructions*, 8; *Municipal Corporations*, 4; *Negligence*, 8, 9, 10.

1. **Personal Injuries: Damages: Impairment of Earning and Labor Capacity: Evidence.** In order to permit the jury to consider as an element of damages in a personal injury suit, the impairment of plaintiff's capacity to perform labor, it is

PERSONAL INJURIES—Continued.

not necessary to offer proof of what the injured party's earnings were at the time of the injury, but there is a distinction between capacity to perform labor and earning capacity. To recover for loss of earning capacity there must be evidence tending to show the injured party's earnings prior to the injury and to what extent it had been impaired. *McNeil v. Cape Girardeau*, 424.

2. **Same: Street Car: Electric Pole.** Where a street railway company operated by electricity, plants its poles for carrying the wire so close to the tracks as to endanger the safety of the conductor in attending to the duties devolved upon him, it is liable for an injury which he receives by being struck by the pole as the car passed. *Tewksbury v. Railroad*, 500.
3. **Same: Negligence: Contributory Negligence: Assumption of Risk.** Where a street railway company operated by electricity, planted its iron poles within fifteen or eighteen inches of the track, and where a conductor, while the car was running, was endeavoring, by leaning out beyond the car, to throw the trolley rope around the corner of the car so that it would hang over the rear of the car, which was its proper place, and was struck by the pole and injured. *Held*, that the company's negligence and the conductor's contributory negligence and assumption of risk were all questions for the jury. *Ib.*

PERSONAL PROPERTY. See *Estates by the Entirety*, 1, 2, 3, 4.

PHYSICIANS AND SURGEONS.

Physicians and Surgeons: Practicing Without License: Crimes and Punishments: Information: Failure to Negative Exception in Statute. An information, under section 8315, Revised Statutes 1909, charging defendant with representing himself to be a duly authorized practicing physician and surgeon when he had no license from the state board of health and was not a registered physician, which fails to negative the proviso in said section, to the effect that physicians who were registered on or prior to March 12, 1901, shall be regarded as licentiates and registered physicians, is insufficient; the proviso being part and parcel of the enacting clause of the statute, and it being necessary, therefore, to negative it in the information. *State v. Brand*, 27.

PLEADING. See *Carriers of Passengers*, 9, 10, 11, 29, 31; *Contracts*, 4, 5, 6; *Damages*, 2; *Deeds of Trust*, 4, 5, 6; *Malicious Prosecution*, 1; *Slander and Libel*, 14; *Taxbills*, 1, 2, 3.

1. **Pleading: Sufficiency of Petition: Not Attacked by Demurrer.** The averments of a petition, when not challenged by demurrer, must be interpreted by affording all reasonable inferences and intendments in their favor. *Brandt v. Railway*, 16.
2. **Same: Demurrer to Petition: Allegations to Be Taken as True.** The court, on demurrer to a bill of interpleader, must take the averments thereof as importing verity. *United Railways v. O'Connor*, 128.
3. **Same: Demurrer to Petition: Inferences.** Inferences are not indulged in aid of a petition challenged by demurrer as they are after judgment when no demurrer has been interposed. *Ib.*

PLEADING—Continued.

4. **Same: Prayer for Relief Beyond Court's Jurisdiction: Effect.** The fact that a petition, in conjunction with a proper prayer for relief, includes a prayer for action which the court is without jurisdiction to take, does not deprive the court of jurisdiction to entertain the petition and grant such proper relief. *State ex rel. v. Sale*, 273.
5. **Same: Malicious Prosecution: Want of Probable Cause.** In an action for damages for malicious prosecution a general averment of want of probable cause is ordinarily sufficient and it is not necessary to allege the facts which show or tend to show the want of probable cause. *Wilkinson v. McGhee*, 343.
6. **Same: Negligence: Willfulness: Inconsistent Pleading: Willfully and Negligently Spreading Contagious Disease.** In a suit to recover damages from defendant for communicating smallpox to plaintiff and her family, the petition was in one count and charged defendant with "knowingly and intentionally" communicating the disease, and in another part of the petition charged the defendant with negligence which resulted in communicating the disease. *Held*, that the allegations were inconsistent and that the demurrer to the petition should have been sustained. *Christy v. Butcher*, 397.
7. **Same.** In actions for damages charging negligence where the petition alleges "gross negligence" or "willful negligence," the words "gross" or "willful" may be treated as surplusage in such pleadings, and the petition construed as stating merely an action for negligence. But it is improper to charge that one caused injury to another by careless, negligent, wanton and willful misconduct. *Ib.*
8. **Same.** There is a distinction between ordinary negligence and intentional wrong. When willfulness enters, negligence steps out. The former is characterized by advertence, and the latter by inadvertence. *Ib.*
9. **Same: May Be Attacked by Demurrer.** When a petition in one count alleges the injury incurred was caused by the negligence of the defendant, and also by the willful act of the defendant, it is proper to attack it by a demurrer and not by motion to require plaintiff to elect. *Ib.*

PRACTICE, APPELLATE. See *Carriers of Passengers*, 38; *Executors and Administrators*, 1; *Interplea*, 7; *Jurisdiction*, 5, 6, 7.

1. **Practice, Appellate: Questions Reviewable: Abstract.** The court, on appeal, will not pass upon a contention that an instruction is erroneous as going beyond the duties imposed by an ordinance, where appellant failed to set out the ordinance in his abstract. *Voelker v. Construction Co.*, 1.
2. **Same: Dismissal as to Co-defendants: Right to Complain.** A defendant against whom a judgment is rendered in an action for negligent death may not complain because the cause was, at the close of plaintiff's evidence, dismissed as to co-defendants. *Ib.*
3. **Same: Non-prejudicial Error.** Appellate courts are commanded by the statute not to reverse judgments except for error materially affecting the merits as to the party complaining on appeal. *Brandt v. Railway*, 16.

PRACTICE, APPELLATE—Continued.

4. **Same: Review: Sufficiency of Exceptions.** In a trial to the court, the failure of defendant to except to special findings of fact made by the trial court will not prevent the appellate court from reviewing the action of the trial court in overruling a demurrer to the evidence, which action was excepted to. *Rose v. Insurance Co.*, 90.
5. **Same: Conclusiveness of Finding: Uncontroverted Evidence.** In an action at law, even though plaintiff's evidence is not controverted by words, its weight is for the trier of the facts, whose finding is binding upon the appellate court, in the absence of a showing that the trier acted arbitrarily, under the influence of passion or prejudice. *Pierce Loan Co. v. Killian*, 106.
6. **Same: Evidence: Refusing to Strike Out Irrelevant Evidence: Trial Practice.** Where the trial court sitting as a jury, just before making its finding, overruled a motion to strike out irrelevant testimony, admitted on defendant's promise to make its relevancy appear later in the case, but which promise was not fulfilled, it thereby indicated that such evidence was considered in making its findings, and as such evidence was used to impeach plaintiff's most important witness, whose credibility, together with that of the others, was practically the only question in issue, the error in refusing to strike such irrelevant testimony was reversible. *Ib.*
7. **Same: Review: Weight of Evidence.** The weight of the evidence is for the trial court, and the appellate court will not disturb its conclusion, unless the verdict is grossly contrary to the evidence, or is entirely unsupported by any evidence of a substantial and probative character. *Knapp v. Hanley*, 169.
8. **Same: Changing Theory on Appeal.** Where cases are tried on theories not altogether in line with the pleadings, the parties on appeal will be held to the theory on which the case was tried below. *Ib.*
9. **Same: Abstracts: Compliance with Rules: Waiver.** The court may, if it sees proper, not only waive non-compliance with Rule 33, which requires respondent, if he desires to question the sufficiency of appellant's abstract, to file his objections thereto in writing in the office of the clerk, within ten days after a copy of the abstract has been served upon him, but the court may, of its own motion, notice and take up any defect in the abstract which is material to the proper disposition of the cause, and may even disregard the entire abstract, if it utterly fails to comply with the statutes or established practice of this court and the Supreme Court. *Construction Co. v. Westen*, 185.
10. **Same: Defective Abstract.** Where it is impossible to determine from an inspection of the abstract what are matters of record proper and what are matters of exception, the court may, in its discretion, dismiss the appeal or affirm the judgment. *Ib.*
11. **Same: Presumption that Judgment is Correct: Burden on Appellant to Overthrow.** The court, on appeal, will presume that a judgment for defendant is correct as to all the issues, and it devolves on plaintiff appealing therefrom to show that it is not correct. *Ib.*

PRACTICE, APPELLATE—Continued.

12. **Same: Equity Case: Findings Not Conclusive.** The court, on appeal in an equity case, is not bound by the findings of the chancellor either as to ultimate facts or conclusions of law, though it will defer in a great measure to his findings and judgment. *Construction Co. v. Westen*, 185.
13. **Same: Abstract: Must Embody All the Evidence.** In a proceeding by motion for execution against a stockholder of a corporation, under section 3004, Revised Statutes 1909, while, on appeal, it is not necessary, under Rule 9, requiring the embodying in the bill of exceptions of all the evidence in equity cases, to set out in the abstract the questions and answers, it is necessary that the abstract contain substantially all of the evidence offered and produced in the trial court, and an abstract in such a case which merely presents an imperfect synopsis of or detached quotation from the evidence is insufficient to permit the appellate court to review the sufficiency of the evidence to sustain the findings. *Ib.*
14. **Same: Overruling Motion for New Trial: Sufficiency of Exception.** In order to permit a review on appeal of matters of exception, it is not necessary that there be both objection and exception to the action of the court in overruling the motion for a new trial, but it is sufficient if an exception to such action be duly saved, since such exception includes objection. *Stevens v. Maccabees*, 196.
15. **Same: Exceptions to Instructions: Necessity of Objections.** The appellate court will not inquire into the correctness of an instruction given by the trial court of its own motion, in lieu of all instructions asked by the adverse party, unless the party complaining of the instruction objected to the giving of it before it was given, an exception to the instruction after it was given not being sufficient. *Ib.*
16. **Same: Admission of Evidence: Sufficiency of Objection.** An objection to a question propounded, that it is immaterial, is not specific enough to challenge the ruling of the court admitting the evidence. *Ib.*
17. **Same: Abstracts: Failure to Set Out Entire Evidence.** In an equity case where appellant's abstract of the record does not contain all of the testimony that was before the trial court, the presumption is that the trial court committed no error in its findings. *Yancy v. Jones*, 206.
18. **Same: Rules Construed.** Under Rule 9 of St. Louis Court of Appeals, requiring the whole evidence to be embodied in the bill of exceptions in equity cases, the court, on appeal, in an equity case, may refuse to review the sufficiency of the evidence, unless the entire evidence is presented in the abstract of the record, except where the case was tried on an agreed statement of facts, under Rule 24; Rule 8, providing that for the purpose of reviewing the giving or refusing of instructions it shall be sufficient to state there was evidence to prove a particular fact applying to actions at law. *Ib.*
19. **Same: Objections and Exceptions: Not Made During Trial.** Where objections and exceptions are not made during the trial, they cannot be made in the motion for a new trial or in the brief filed in the appellate court. *Fenn v. Reber*, 219.

PRACTICE, APPELLATE—Continued.

20. **Same: Conclusiveness of Verdict.** A verdict, supported by substantial evidence and approved by the trial judge is conclusive on appeal. *Ib.*
21. **Same: Instructions: Harmless Error.** An instruction which is erroneous as requiring the jury to find facts not essential to plaintiff's recovery is not prejudicial to defendant, and he cannot be heard to complain thereof. *Oehmen v. Portmann*, 240.
22. **Same: Excessive Damages: Remittitur.** Where certain elements of damages are erroneously submitted to the jury, but the proof concerning an element for which a recovery might be had is exact and definite as to amount, the appellate court may affirm the judgment on condition that it be remitted down to such definite amount, rather than reverse the judgment and remand the cause. *Ib.*
23. **Same: Motion for New Trial: No Exception to Order Overruling.** Where no exception is preserved to the overruling of the motion for a new trial, the case stands on appeal as though a motion for a new trial had not been made. *Hemm v. Juede*, 259.
24. **Same: Motions After Final Judgment: Motion for New Trial Not Necessary: Bill of Exceptions Necessary.** The rulings of the trial court on motions made after final judgment, such as motions to quash an execution, pay over money on execution, set aside a judgment for irregularity, set aside an execution sale, and the like, are reviewable on appeal without motion for rehearing or new trial, and the fact that the judgment entered in the case does not affirmatively show the ground of the court's judgment, or that the evidence was taken on the motion, does not change the rule, but, under such circumstances, a bill of exceptions is necessary to advise the appellate court of the nature of the motion and the evidence adduced. *Ib.*
25. **Same: Independent Proceeding: Motion for New Trial Necessary.** A ruling on a motion, which is treated as an independent proceeding, is not reviewable on appeal, in the absence of a motion for new trial. *Ib.*
26. **Same: Motion After Final Judgment: Prayer for Distribution of Funds of Dissolved Partnership: Motion for New Trial Not Necessary.** In an action for the dissolution of a partnership, where the final decree directed the receiver to distribute the proceeds of the firm's assets equally between two partners, a motion by the trustee in bankruptcy of one of the partners, filed after the rendition of said decree, praying for an order directing the receiver to turn over to the trustee the bankrupt's share of the dissolved partnership assets, is not the commencement of an independent proceeding, as the trustee merely stands in the place of the bankrupt, and the ruling on such motion is reviewable on appeal although no motion for a new trial thereon was filed. *Ib.*
27. **Same: Construction of Opinion.** The conclusion arrived at by a court in a decision, and not the reasoning by which the conclusion was reached, nor the mere language of the decision, constitutes the guide by which the extent of the rule announced is determined. *State ex rel. v. Sale*, 273.

PRACTICE, APPELLATE—Continued.

28. **Same: Conclusiveness of Finding.** Where there is substantial evidence to support a finding of the trial court, the judgment with respect to such matter should be affirmed. *Heaton v. Dickson*, 312.
29. **Same: Presumption in Aid of Verdict.** On appeal, all reasonable inferences from the testimony and from the appearance and conduct of the witnesses must be considered in aid of the verdict. *Ib.*
30. **Same: New Trial: Discretion of Lower Court.** The discretion of the trial court in supervising and setting aside verdicts, on matters pertaining to the facts, will not be reviewed on appeal, unless such discretion has been abused or arbitrarily exercised. *Rigby v. Transit Co.*, 330.
31. **Same: Absolute Right to Grant One New Trial.** Where but one new trial has been granted and the trial court has awarded it because of a decision of matters *in pais*, the verdict will not be reinstated on appeal, if there appears substantial evidence to sustain a verdict for the party to whom a new trial was awarded. *Ib.*
32. **Same: Failure to File Brief.** When appellant files in the appellate court nothing but a printed abstract—no statement or assignment of error, as required by the statute and rules of the court, the appeal will be dismissed. *Matthews v. Insurance Co.*, 386.
33. **Same: Evidence.** Where the appellate court finds nothing in the evidence to challenge credibility, but where plaintiff's account of her injury, caused by the negligence of defendant city in failing to maintain in proper repair a board sidewalk on one of its public streets, was a hypothesis of fact which the jury were entitled by the evidence to accept, *held*, that the appellate court will not declare plaintiff's evidence wholly devoid of probative value on the ground that it is inconsistent with the physical facts of the situation. *Kelley v. Kansas City*, 484.
34. **Same: Instructions: Too Numerous.** Where the instructions offered by the defendant are too numerous for the purposes of the issues involved, such practice is calculated to confuse both the court and the jury, and thereby engender error. Hence, where the cause will have to be reversed in any event, the appellate court will not discuss those instructions offered by the defendant and refused by the trial court. *McGee v. Railway*, 492.
35. **Same: Evidence: Credibility of Witness.** In an action for damages for personal injuries caused by the alleged negligence of the defendant street car company, the appellate court will not pass upon the credibility of plaintiff's testimony where nothing is urged or can be urged to support the supposition that plaintiff could not have been injured in the manner that he claimed that he was, but that he lied about the facts. *Ib.*
36. **Same: Admission at Trial.** It is a settled rule of practice that an admission of fact, on which the cause is tried in the circuit court, is binding on the parties in the appellate court. *Sash & Door Co. v. Bradfield*, 527.

PRACTICE, APPELLATE—Continued.

37. **Same: Cause Remanded: Humanitarian Doctrine.** Although the issue of negligence under the humanitarian doctrine was abandoned by plaintiff in the trial of the case, where, in the opinion of the appellate court, the evidence was such that the trial court would have been justified in submitting that issue, had it not been abandoned, it is but just to remand the cause, and give plaintiff an opportunity to have his case tried on the only tenable ground. *Gordon v. Railroad*, 555.
38. **Same: Demurrer to Evidence: Contributory Negligence.** Where, at the close of plaintiff's evidence, and at the close of all the evidence, defendant asked the court to direct a verdict in its favor, but these requests were refused, and the cause was submitted to the jury on the sole issues of whether the peril of the deceased was caused by the negligent manner in which the car was operated, or was caused wholly or in part by the negligence of the deceased, defendant is not bound by the submission in its instructions of contributory negligence as an *issue of fact*, but, if defendant preserves its exceptions, it may return in the appellate court to its demurrer to the evidence, and present the question whether the excessive speed at which the car was negligently operated was the sole cause of the injury, and deceased was not guilty *in law* of contributory negligence. *Ib.*
39. **Same: Instructions: Humanitarian Doctrine.** Where plaintiff asked no instructions, and did not object to those given at the request of the defendant, among which was an instruction that there was no evidence in the case that defendant's motor-man running and operating the car which struck deceased, could have stopped or checked the speed of the car, after deceased placed himself in a position of peril, in time to have avoided the injury, *held*, that plaintiff, in effect, approved the instruction as given, and thereby admitted that the evidence most favorable to plaintiff would not sustain the charge of negligence under the humanitarian doctrine, and that on appeal plaintiff cannot renounce that position. *Ib.*
40. **Same: Instructions: Necessity of Objections.** Where the defendant failed to object at the trial to any of the instructions given at the request of the plaintiff, the rule "that before one can legally except to the action of the court in giving or refusing instructions, he must first request the court to give the same or object thereto, as the case may be, before his exceptions will be availing," applies not only to instructions involving constitutional questions, but is applicable to all given instructions. Hence, assignments of error by defendant relating to such instructions of plaintiff, are not before the appellate court. *Sheets v. Insurance Co.*, 620.
41. **Same: Review of Evidence: Motion for Nonsuit.** The rule that appellate courts have no authority to pass upon the weight or credibility of the evidence, prevents an appellate court from reviewing an action of the trial court in overruling defendant's motion for a nonsuit, although under the facts and circumstances of the case, the appellate court thinks that the plaintiff should not have prevailed, provided that the jury accepted plaintiff's evidence as true, notwithstanding that the great preponderance of the evidence on the part of the defendant was otherwise. *Roberts v. Railroad*, 638.

PRACTICE, APPELLATE—Continued.

42. **Same: Error: Cured by Remittitur.** In an action for trespass *vi et armis*, where the jury rightfully found punitive damages, but also, under an erroneous instruction, found compensatory damages, the cause will stand reversed and remanded unless the plaintiff enters a remittitur of the amount allowed as compensatory damages. *Coffee and Spice Co. v. Welborn*, 647.
43. **Same: Garnishments: Defense of Void Judgment.** Where, after a judgment against a non-resident defendant, a further judgment is rendered against a garnishee, upon its failure to appear after plaintiff's denial of its answer to plaintiff's interrogatories, the garnishee is not estopped from setting up the fact on appeal that the judgment rendered against it is void. *Railway v. Morris*, 667.

PRACTICE, TRIAL. See Evidence, 9.

1. **Practice, Trial: Evidence: Striking Out Irrelevant Evidence.** Where irrelevant testimony is admitted on the promise of counsel to make its relevancy appear later in the case, and counsel fails to so connect it, it is error to overrule a motion by the adverse party to strike out such irrelevant testimony at the close of the whole case. *Pierce Loan Co. v. Killian*, 106.
2. **Same: Remarks of Court; Harmless Error: Appellate Practice.** A remark by the court, in overruling an objection, that the objection was technical, was, at most, harmless error. *Rollins v. Schawacker*, 284.
3. **Same: Remarks of Court: Ruling on Evidence.** The trial court ruled as incompetent the testimony of a witness, but later in the trial changed its ruling and permitted the witness to testify. The remarks of the trial court in the presence of the jury in regard to changing its ruling are examined and held not improper. *Brinkman v. Gottenstroeter*, 351.
4. **Same: Remarks of Counsel: Objections.** If the argument of counsel is proper as to a particular issue in a case and improper as to others, then the opposing parties should ask the court to limit the effect of the argument to the proper issue and a general objection will not do. *Ib.*
5. **Same: Parties: Interlocutory Judgment: Admitting New Defendants Before Final Judgment.** Plaintiff sued one of the defendants on account of breach of contract, and to have a lien declared on certain real estate. An interlocutory judgment was rendered against this defendant and the cause continued, when at a subsequent term respondent asked to be made a party to the suit for the reason that he had purchased the real estate in question in good faith and without actual knowledge of the pending suit. *Held*, that it was within the power of the trial court in the exercise of a wise discretion to permit respondent to come in and defend any time before final judgment. *Dazey v. Laurence*, 435.

PRESUMPTION. See Evidence.

PRINCIPAL AND AGENT. See Instructions, 5.

1. **Principal and Agent: Joint Agency: Instructions: Refusal: Abstract and Confusing Instructions.** In an action to secure one-half of certain commissions received by defendant for the sale of corporate stock, where plaintiff alleged that he and de-

PRINCIPAL AND AGENT—Continued.

fendant had been jointly employed to sell said stock and had agreed to divide equally the compensation received therefor, and that the owner of the stock had paid plaintiff one-half of the amount of the agreed compensation, the court refused to give an instruction offered by plaintiff, declaring that if the jury believed plaintiff and defendant were the owner's agent through whom the sale was made, then by legal implication, in the absence of distinct proof of separate agency, the authority conferred upon and rights acquired by the agents were presumed to be joint, and such joint agency, if the jury find it existed, operated to confer upon them joint rights and interests in the transaction and all profits resulting from it, and, in the absence of a distinct agreement for a different allotment, the interest of each was equal; that the law exacted from the agents the highest degree of good faith toward their principal and in their dealings with each other, and would not allow one of them, after receiving the entire compensation paid by the common principal for their services, to appropriate the whole amount and exclude his associate from any participation, under color of a separate understanding had with the common principal during the existence of such joint agency. *Held*, that the really material part of said refused instruction was correctly covered by an instruction given; that said refused instruction deals too much in generalities to bring it within the comprehension of an ordinary juror; that it fails to apply the principles of law announced to the facts of the case; that it assumes there was a joint employment of the agents when this was the very fact in controversy in the case, without stating the facts necessary to constitute the employment a joint one; and that it injected the question of fraud into the case, without any foundation therefor in the petition and hence the refusal of said instruction was proper. *Knapp v. Hanley*, 169.

2. **Same: Agent Acting for Both Parties.** Where the parties have knowledge of the agent's relations to each other and see fit mutually to trust him, there is no legal objection to his acting as agent for both parties. *Peters v. Carroll*, 375.

PRINCIPAL AND SURETY.

1. **Principal and Surety: Payment of Obligation Secured: Discharge of Surety.** The surety's obligation is secondary to that of the principal obligor, and when it appears the principal has paid the debt secured, the obligation of the surety is fully discharged. *Stolze v. Fidelity Co.*, 29.
2. **Same: Discharge of Principal After Judgment: Discharge of Surety.** The relation of principal and surety is not destroyed by a judgment against them, but so long as the relation continues, the equities which inhere therein obtain and are available for the surety's relief, so that where a judgment was rendered against the principal and surety on an appeal bond, and the principal alone appeared, and the judgment as against the principal was reversed, such reversal operated to discharge the surety, and the judgment rendered against the surety, which was unappealed from, could not be enforced. *Ib.*
3. **Same: Statute.** The fact that section 2769, Revised Statutes 1909 makes the obligation of the parties both joint and several and that a judgment thereon is regarded as such a contract is without influence in a case where a judgment on an appeal

PRINCIPAL AND SURETY—Continued.

bond against both principal and surety, which is reversed as to the principal on his appeal, is sought to be enforced against the surety, who did not appeal, inasmuch as the statute does not contemplate nor intend to annihilate the equities which obtain between joint obligors and which attend the relation of principal and surety. *Stolze v. Fidelity Co.*, 29.

PROBATE COURTS. See *Executors and Administrators*, 1.

RAILROADS. See *Carriers of Passengers*, 1, 5, 6, 7, 8, 11, 24, 25, 26, 34, 35, 37.

1. **Railroads: Removal of Trees Adjacent to Right of Way: Statute.** Section 3049, Revised Statutes 1909, conferring authority on railroad companies to go in and upon the lands of adjacent proprietors and remove threatening trees, making compensation therefor, is parcel of the charter of railroad companies and lays a duty upon them accordingly. *Rice v. Railroad*, 35.
2. **Same: Negligence: Crossing: Milch Cows.** Where an owner of two milch cows turns them out of a neighbor's pasture into the public road, to take them to his home, a short distance away, and across a railway track, and they are killed by a train which gave no signal of approach, the railway is liable where the owner, on seeing the train, endeavored to turn the cows back. *Tate v. Railroad*, 533.
3. **Same: Sounding Whistle: Ringing Bell: Instruction.** An instruction which directs the jury to find for the plaintiff the value of his milch cows killed at a public crossing, if they believe the railway company's servants neglected to sound either the whistle or the bell, is erroneous. *Ib.*
4. **Same: Evidence.** But if, in such case, the railway company does not introduce any evidence, and the plaintiff shows by undisputed affirmative testimony that neither the bell nor the whistle was sounded, the error is harmless. *Ib.*

REAL ESTATE AGENTS.

1. **Real Estate Agents: Division of Commission.** If real estate agents having lands for sale for other parties contract with another agent agreeing to give him "one-half of all gross profits made by us in the sale of any real estate to customers brought or sent to us by you," they are liable to such agent who produces a buyer who makes the purchase of such agents. *Gould v. St. John*, 513.
2. **Same: New Trial: Second Appeal.** Where a new trial was granted to a defendant on account of the evidence not preponderating in favor of the plaintiff, and an appeal taken from that order to an appellate court which sustained the trial court, and on the second trial additional evidence is had in the plaintiff's favor, making a case for the jury, and a verdict is again rendered for plaintiff, a second new trial should not be granted on the ground of the weight of evidence. *Ib.*
3. **Same: Instructions.** Instructions which are liable to mislead or which call special attention to one phase of the evidence, are properly refused. *Ib.*

REAL ESTATE AGENTS—Continued.

4. **Same: Commission: Instruction.** In an action on a note given a real estate agent for commission for the exchange of property, where the defense is want of consideration because a commission was paid by the other party to the transaction, and no notice given them by the agent that he was acting for both parties, it was error for the court to refuse an instruction that the burden of proof was on the defendants to show by a preponderance of the evidence that the defendants and the other party to the exchange of property were not aware that plaintiff was acting as agent for both of them. *Real Estate Co. v. Thompson*, 543.
5. **Same: Purchase at Partition Sale: Bids: Public Policy.** G. and his wife desired to invest in Kansas City property and engaged a real estate agent to look for a satisfactory purchase, the seller to pay the commission. Property was found, but it was ascertained that it was to be sold at partition sale where the seller could not pay commission. It was then agreed that the agent would not look for other purchasers of the property and that he would notify G. and his wife when and where the sale would take place and would attend the sale and assist them; it being agreed that G. and wife would pay the ordinary commission on sales of such property. The agent performed the service agreed and G. and wife purchased the property at the sale. It was *held* that the agent could maintain an action for the commission. And that the agreement not to look for other purchasers at the sale was not fraudulent or void as against public policy. *Davis v. Gross*, 607.

RECEIVERS. See *Mandamus*, 1.

RELEASES.

1. **Releases: Denial of Contract: Tender Not Necessary.** In an action for personal injuries, where the execution of a release pleaded in the answer is denied, there was no necessity of a tender of the amount alleged to have been received. *Chalmers v. Railway*, 55.
2. **Same: Rescission: Tender.** A tender of the amount received is a prerequisite only in those cases where plaintiff concedes that he executed the release and seeks to avoid it. *Ib.*
3. **Same: Execution: Jury Question.** In a personal injury action, whether plaintiff executed a release of damages and received and withheld an order on defendant's treasurer until after suit was brought, *held*, under the evidence, for the jury. *Ib.*

REMITTITUR. See *Practice, Appellate*, 22, 42.

REPLEVIN.

Replevin: Sale: Sufficiency of Evidence. In a replevin suit for a cow which plaintiff claimed to have purchased from defendant, the uncontradicted evidence is *held* sufficient to show that plaintiff had purchased the cow and was entitled to possession thereof upon payment of the balance of the purchase money, and that the trial court erred in finding for the defendants. *Estis v. Harnden*, 381.

RES ADJUDICATA. See Jurisdiction, 2.

RES GESTAE. See Evidence, 17, 18.

RES IPSA LOQUITUR. See Carriers of Passengers, 3, 5, 6, 11; Negligence, 7.

RESCISSION. See Releases, 2.

ROADS AND HIGHWAYS.

1. **Roads and Highways: Nuisance: Injunction.** Where a road is sufficiently located, and the evidence is overwhelming that it was dedicated to public use by the owners of the land, and accepted by the public as such, and has been in continuous use as such up to the time it was obstructed by the defendants by fences which closed the road, a judgment abating the nuisance, and enjoining the defendants from further maintaining of the fences is proper. *State ex rel. v. Busse*, 466.

2. **Same: Statutes.** Section 9694, R. S. 1899, refers to roads that have been opened by order of the county court, in which there were irregularities in the proceedings, and where there had been non-user for ten consecutive years, and has no bearing where it is sufficiently shown that labor was expended on the road in question. *Ib.*

3. **Same.** Section 9472, R. S. 1899, refers in part to roads established solely by dedication or public user, and has no bearing where it is sufficiently shown that labor had been expended on the road in question, coupled with the further fact that this section was first enacted in 1887, at which time the road in question had been in use by the public previously for ten consecutive years. *Ib.*

SALES. See Carriers of Goods and Passengers, 9; Contracts, 9, 10; Corporations, 5; Deeds of Trust, 1; Evidence, 4; Fire Insurance, 5; Replevin, 1; Statute of Frauds, 1.

Sales: Payment: Right of Possession. When all the terms of a contract for the purchase of personal property have been fully agreed upon and the transfer of possession to the purchaser is subject only to the payment of the balance of the purchase price, the purchaser has become the owner of the property with the right in the vendor only to retain the possession thereof until the balance of the purchase price has been offered or paid. *Estis v. Harnden*, 381.

SET-OFF. See *Grier v. Strother*, 292; Partnership, 10, 11.

SIDEWALKS. See Evidence, 12, 13; Municipal Corporations, 1, 2, 3, 4, 5.

SLANDER AND LIBEL

1. **Slander and Libel: Privileged Communication: Qualified Privilege.** Privileged communications are of two characters, absolute and qualified. A qualified privilege extends to all communications made bona fide upon any subject-matter in which the party communicating has an interest, or in reference to which he owes a duty to a person having a corresponding

SLANDER AND LIBEL—Continued.

- duty or interest; and to cases where the duty is not a legal one but where it is of a moral or social character of imperfect obligation. Such communication when spoken in actual malice is not privileged. *Rose v. Tholborn*, 408.
2. **Same: Malice.** In an action for slander the circumstances under which the words were spoken, were *held* not to bring them under the term of absolute privileged communication, but were privileged only if spoken in good faith and from a sense of duty, and if they were spoken in actual malice, the communications were not privileged. *Ib.*
 3. **Same: Evidence: Admitting Slandorous Words Not Alleged.** Ordinarily slanderous words, other than the words charged in the petition to have been intended, are properly admitted as evidence of malice on the part of the defendant. *Ib.*
 4. **Same: Property: Injunction.** The right of privacy is a legal right of property, the principal of which has been ever recognized and it is entitled to protection at the hand of the courts. Its invasion may be restrained in equity by injunction *Munden v. Harris*, 652.
 5. **Same: Action at Law: Damages: Pleading.** General damages may be recovered in an action at law for a violation of the right of privacy, without an allegation of special damage. And if malice be shown, exemplary damages may be had. *Ib.*
 6. **Same: Picture: Advertisement.** If one published the picture of another without his consent, it is an invasion of his right of privacy and a violation of his right of property, which may be restrained by injunction, or redress in damages, both general and special. *Ib.*
 7. **Same: Enjoyment of Life: Seclusion.** The right of privacy includes the right to enjoy life and pursue happiness, subject only to the rights of others. A person may therefore, adopt a life of seclusion with a right to remain undisturbed if he so desires. *Ib.*
 8. **Same: Waiver of Right: Public Character: Society.** Though one has the right of privacy in his picture as a right of property, he may waive the right by becoming a public character, or by conduct exciting public interest. And such right does not subvert those rights in others which spring from social and business conditions, whereby they may freely speak of and refer to every other person in the social organization, so long as it is not slander. *Ib.*
 9. **Same: Picture: Libel: Advertisement.** Where persons in business published a child's picture connected with the following words as an advertisement, viz: "Papa is going to buy mamma an Elgin watch for a present, and some one (I mustn't tell who) is going to buy my big sister a diamond ring. So don't you think you ought to buy me something? The payments are so easy, you'll never miss the money, if you get it of Harris-Goar Co., 1207 Grand Ave., Kansas City, Mo. Gifts for Everybody, Everywhere in their Free Catalogue." It was *held* to be libel on the child for which general and exemplary damages could be recovered. *Ib.*

SLANDER AND LIBEL—Continued.

10. **Same: Infant: Tender Years: Trespass.** An infant of tender years, though *doli incapax*, may be liable for compensatory damages for trespass, as malice is not necessary to that action. But punitive damages cannot be recovered in such a case. *Munden v. Harris*, 652.
11. **Same: Tender Years: Libel.** An infant of tender years, too young to be capable of malice or evil intent, cannot be guilty of libel or slander. And the law will adopt the age fixed by the common law for responsibility for crime and it is *held* that an infant under seven years of age cannot be guilty of libel or slander, since he is *doli incapax*. *Ib.*
12. **Same: Libel.** Notwithstanding an infant is *doli incapax* and incapable of libel or slander, yet he may be libelled or slandered, since the two conditions are not correlative. *Ib.*
13. **Same: Tender Years: Ridicule.** An infant five years of age may be libelled by publication of his picture in connection with words purporting to have been uttered by him which would render him liable to the contempt and ridicule of his fellows. *Ib.*
14. **Same: Pleading: Meaning of Charge: Instructions.** Where the charge in the petition for libel is that defendant published of a boarding-house keeper that she was "delinquent" and that by such publication it was meant that she was not worthy of credit and was on the black list, it was held that the plaintiff is bound by the meaning attached to the words by the petition and therefore it was error to include in an instruction the issue whether plaintiff was dishonest. *Patterson v. Evans*, 684.
15. **Same: Commercial Journal: Credit.** It is libel *per se* to publish in a commercial credit journal, of a boarding-house keeper that she is "delinquent," or is "unworthy of credit." *Ib.*
16. **Same: Damages, General and Special.** In libel *per se*, special damages need not be alleged, as general damages will be presumed, and need not be proved, though they may be. *Ib.*
17. **Same: Cross-Examination: Credit.** Where the plaintiff in an action for libel testified to her loss of credit, it was wrong to exclude cross-examination whether her credit existed at the places she stated, only by reason of her securing the purchase by chattel mortgage. *Ib.*

STATUTES, CONSTRUCTION OF. See Corporations, 1; Fire Insurance, 2, 3; Fraternal Beneficiary Associations, 10, 11, 12, 13, 14, 15; Life Insurance, 1, 2, 3, 4, 8, 11, 12, 13, 14; Principal and Surety, 3; Railroads, 1; Roads and Highways, 2, 3.

1. **Statutes: Construction of: Technical Terms: Question for Court.** In construing a statute, the meaning of technical terms is a question for the court, and it may determine their meaning by consulting books of reference, or referring to persons who have knowledge on the subject. *Rose v. Insurance Co.*, 90.
2. **Same: Settled Meaning.** In construing a statute containing technical terms, it is important to ascertain whether the words had a settled technical meaning before the statute was enacted, as, in that case, it will be assumed the Legislature used them in that sense. *Ib.*

STATUTES, CONSTRUCTION OF—Continued.

3. **Same: Construction of Remedial Statute: Evils to Be Corrected.** In construing a remedial statute, the mischievous practice or evil intended to be terminated or cured by its enactment may be considered. *Ib.*
4. **Same: Attorney's Lien: Assistant Attorney: Lien: Principal Attorney.** If the principal attorney in a case, on his own account and not as agent of his client, employs an assistant attorney, agreeing to pay him a portion of his contingent fee, the assistant attorney is not entitled to a lien for his services on either the client's or the principal attorney's part of the sum recovered. But if such assistant is employed by the principal attorney by authority of the client, he is entitled to a lien on the client's portion of the sum recovered. *Smith v. Wright*, 719.
5. **Same: Equitable Assignment: Legal Remedy.** If an assistant attorney is employed by the principal attorney he has his action at law for his fee against the principal attorney and is not entitled to an equitable assignment of the principal attorney's fee to secure what the latter agreed to pay him. *Ib.*

STATUTE OF FRAUDS.

1. **Statute of Frauds: Sales: Agreement to Be Performed in One Year.** To remove a contract from the operation of the Statute of Frauds (section 2783, Revised Statutes 1909), it must be one that may be fully performed within a year. *Keller v. Fertilizer Co.*, 120.
2. **Same: Postponement of Performance: Facts Stated.** The computation of time, in ascertaining whether a contract will be performed in one year, begins from the making of the contract, and not from the date stipulated for performance to begin; and hence a verbal contract entered into November 21, 1907, which provided for the sale and delivery of all of certain material which the seller might accumulate during the year commencing November 22, 1907, and ending November 21, 1908, was a contract not to be performed within a year and hence was within the Statute of Frauds (section 2783, Revised Statutes 1909). *Ib.*
3. **Same: Possibility of Performance Within Year.** A verbal contract which requires certain conduct with respect to the subject-matter for a period beyond a year is within the Statute of Frauds, although there may be a possibility of full performance of the contract within a year. *Ib.*
4. **Same: Contract Defeated Within Year.** A verbal contract expressly providing that it shall not be performed within a year is within the Statute of Frauds, notwithstanding it may be defeated by the happening of a contingency within a year, for in such case, the parties having agreed that performance shall be postponed beyond a year, no contingency happening within a year can amount to performance according to the intention so expressed. *Ib.*
5. **Same: Purely Personal Contract: Indefinite Duration.** Where a verbal contract is purely personal, so that it imposes no obligation upon the personal representatives, and is furthermore indefinite in point of time, the authorities declare it is not within the Statute of Frauds, for the reason that the death of the parties, which may occur within a year, operates as its full performance. *Ib.*

STATUTE OF FRAUDS—continued.

6. **Same: Definite Duration.** A verbal contract which is purely personal and imposes no obligation upon the personal representatives but which expressly creates an obligation for a definite time of more than one year is within the Statute of Frauds. *Keller v. Fertilizer Co.*, 120.

STATUTES CITED AND CONSTRUED.

Charter and Ordinance of Kansas City 1898, Sec. 5, Art. X...	523
Married Woman's Act of 1889	532
Married Woman's Statute	591

Revised Statutes 1889.

Section 5854, see page 255.

Revised Statutes 1899.

Section 544, see page 693.	7896, see pages 73, 74,
2864, see page 692.	83, 84, 86, 90.
3012, see pages 420, 423.	7897, see pages 95, 96,
4340, see page 593.	105.
6067, see page 522.	7995, see page 622.
6075, see page 522.	9472, see page 468.
	9694, see page 468.

Revised Statutes 1909.

Section 194, see page 235.	3049, see page 51.
403, see page 245.	4147-4167 inclusive, see
423, see page 245.	page 227.
758, see page 34.	4149, see page 227.
964, see page 137.	4151, see page 229.
965, see pages 138, 510,	4152, see pages 228, 229.
511.	4535, see page 341.
1751, see pages 454, 456.	4549, see page 341.
1752, see page 454, 456.	4818, see page 661.
1870, see page 305.	5781, see page 612.
1985, see page 235.	5783, see page 612.
2029-2033 inclusive, see	5784, see page 612.
page 225.	6925, see page 104.
2032, see pages 225, 231,	6944, see page 255.
232, 233, 234.	6945, see pages 63, 74,
2306, see pages 455, 456.	83, 84, 86.
2048, see pages 192, 193.	7655, see page 606.
2314, see pages 455, 456.	7656, see page 606.
2667, see page 329.	8057, see page 96.
2783, see page 124.	8315, see page 28.
3004, see page 193.	

STATUTE OF LIMITATIONS. See *Deeds of Trust*, 7.

STOCK. See *Corporations*, 3, 5.

STOCKHOLDERS. See *Corporations*, 1, 2, 3, 6.

STREET RAILWAYS. See *Brandt v. Railway*, 16. See *Carriers of Passengers*, 12; *Personal Injuries*, 2, 3.

SURETYSHIP. See *Principal and Surety*.

TAXBILLS. See **Municipal Corporations**, 6.

1. **Taxbills: Sufficiency of Petition.** A petition which pleads the taxbill *in haec verba*, in a case where the statute gives prima facie effect to such taxbills will be deemed sufficient if it alleges the making of the taxbill; the contents of such taxbills with the date thereof; the assignment; the filing of the same; and that the defendant owned the lot described and against which the lien was sought to be enforced. *Bank v. Shewalter*, 635.
2. **Same: Pleading: Special Defenses.** Where the taxbill in question was signed only by the city clerk, and the petition alleges that it was so executed "by authority of the ordinance of said city," the defendant can not show this matter in defense, by pleading the general issue, but must specially plead the facts constituting such defense in his answer. *Ib.*
3. **Same: General Issue.** An objection that the taxbill does not recite performance of some preliminary steps does not go to the sufficiency of the petition, but relates to matters of defense which might be tendered under the general issue. *Ib.*
4. **Signing: Ministerial Act.** In the absence of statutory command, the council, by ordinance, may delegate authority to the city clerk to sign special taxbills for the signing of such documents is a purely ministerial act. *Ib.*
5. **Same: Right of National Bank to Purchase.** Where the petition averred that plaintiff, a national bank, purchased the taxbill for a valuable consideration, such an allegation, where nothing to the contrary appears, implies that the purchase was one that the bank had authority to make. *Ib.*
6. **Same: Ultra Vires.** Even had it appeared that the purchaser of special taxbills by a national bank was an *ultra vires* act, the purchase would not be held void, but only voidable, and as to the owners of the land was valid in any event. Its validity could not be assailed except in a direct proceeding prosecuted for that purpose by the government. *Ib.*

TENDER. See **Releases**, 1.**TRESPASS.** See **Conversion**, 1; **Damages**, 5, 6; **Landlord and Tenant**, 7; **Slander and Libel**, 10.

Trespass: Malicious Attachment: Actions Distinguished. The defendant in this action committed the trespass in question, by directing the constable to levy on the goods of the plaintiff corporation, after the defendant in the original attachment suit, who was also president of the corporation, had informed the constable, in the presence of the plaintiff in the original attachment suit (who was the defendant in this action) that the goods belonged to plaintiff herein, a corporation, which was not a party to the original attachment suit. *Held*, that where the gist of the petition is that the defendant willfully, maliciously and wrongfully caused the constable to seize plaintiffs goods, well knowing that they belonged to plaintiff, and the petition in addition sets out the foregoing facts, the petition states a cause of action for trespass *vi et armis*, and not one for malicious and wrongful prosecution of the attachment. Hence an allegation that the prosecution was without probable cause is unnecessary. *Coffee and Spice Co. v. Welborn*, 647.

TRUSTEES. See Deeds of Trust, 1, 2, 6; Husband and Wife, 1.

1. **Trustees: Duty of Trustee: Transaction Between Trustee and Beneficiary.** A transaction between the trustee and *cestui que trust* is always scrutinized in a court of equity with a watchful eye, and will not be sustained to the disadvantage of the *cestui que trust*, except upon the most complete and satisfactory evidence of good faith and fair dealing on the part of the trustee. *Heath v. Tucker*, 356.
2. **Same.** While the law exacts of a trustee the utmost good faith in all his dealings with the beneficiary regarding a trust fund, it has never been announced that such dealings are void and are to be held for naught at the instance of the beneficiary by the mere suggestion of the relationship. *Ib.*
3. **Same: Burden of Proof.** There is no difference in the treatment of dealings between trustee and *cestui que trust*, than between strangers, except in the manner and burden of proof when the dealing is assailed in a proper proceeding, charging the trustee with unfairness or fraud. In such cases the burden is upon the trustee to show that the transaction was open, fair, honest and free from fraud on his part where, as in all other cases, he who alleges and charges unfairness or fraud must prove it. *Ib.*
4. **Same: Termination of Relationship: Offer to Rescind.** It appeared from the evidence that during the relationship of trustee and *cestui que trust* existing between plaintiff and defendant, the defendant purchased from plaintiff his equity in the trust property, but that later when no such fiduciary relation existed and plaintiff complained of the transaction, the trustee offered to trade back, which proposition the plaintiff refused. Later the rights of third parties intervened and it was impossible to put the plaintiff in *statu quo*. *Held*, in a subsequent action to rescind, or to require defendant to account and pay more for the property, that plaintiff could not recover. *Ib.*
5. **Same: Equity: Litigant Must Come With Clean Hands.** A litigant coming into a court of equity must come with clean hands, and so where a beneficiary sues to rescind a contract made with his trustee when he knows that it is impossible to restore things to the situation they were in at the time the contract was made, and it also appears that the trustee had offered to rescind prior to the institution of the suit and at the time the parties could have been placed in *statu quo*, *held*, that it would not be fair or equitable to permit plaintiff to sustain such action. *Ib.*

TRUSTS. See Contracts, 8; Creditor's Bill, 1; Deeds of Trust, 1, 2, 3, 7; Partnership, 9.

1. **Trusts: Spendthrift Trusts: May Be Created.** A spendthrift trust, limiting the right to alienate, and placing the proceeds of the estate beyond seizure by creditors of the *cestui que trust* during his life, may be created in this state. *Dunephant v. Trust Co.*, 309.
2. **Same: Heaton v. Dickson, Ante, Followed.** Following *Heaton v. Dickson, Ante*, it is *held* the will under consideration did not create a spendthrift trust. *Ib.*
3. **Same: Limitations Against Alienation and Claims of Creditors: Presumptions: Wills.** While one may by his will settle an estate in trust with an equitable use to another for life, with

TRUSTS—Continued.

a limitation against alienation and free from the claims of creditors, the presumption is that he has not done so, unless either express words to that effect are set forth or a clear and undoubted intention to the same end is manifested in the will. *Heaton v. Trust Co.*, 312.

4. **Same: Spendthrift Trust: Rights of Creditors: Creditors' Bill: Wills: Construction.** A will directing that testator's wife and children, or their heirs, should receive quarterly from his executor one-fifth each of the net income of his real estate did not create a spendthrift trust, and the income of one of the daughters' share was subject to the right of her creditors in a proceeding in equity in the nature of a creditors' bill or an equitable garnishment. *Ib.*
5. **Same: Active Trust: Rights of Creditors.** Creditors of a *cestui que trust* are not inhibited from proceeding against the income from the trust estate merely because the trust is an active one. *Ib.*

ULTRA VIRES. See *Taxbills*, 6.

UNDUE INFLUENCE. See *Contracts*, 8.

VERDICT. See *Damages*, 4; *Death, Wrongful*, 12; *New Trial* 1.

WAIVER. See *Fraternal Beneficiary Associations*, 6, 7, 8; *Slander and Libel*, 8.

WATER WORKS. See *Municipal Corporations*, 10.

WILLS. See *Trusts*, 3, 4.

Wills: Construction: Intent. In construing a will, the court must ascertain the testator's intention from the provisions of the whole document. *Heaton v. Trust Co.*, 312.

WITNESSES. See *Evidence*, 5; *Jury*, 1.

1. **Witnesses: Action Against Administrator: Waiver of Incompetency of Survivor.** In an action against an administrator for goods sold decedent, defendant, by extending the cross-examination of plaintiff's witness beyond the scope of what the witness was competent to testify to on direct examination, waived the witness' incompetency (assuming he was incompetent), so that he became a competent witness for all purposes, and it was error to refuse to permit plaintiff on redirect examination to examine him as to the transactions he had with decedent. *Pierce Loan Co. v. Killian*, 106.
2. **Same: Expert Witness: Evidence Tending to Discredit.** It is proper, on cross-examination, to show that defendant's expert witness, a physician, has been for a long time sustaining to other corporations or parties a relation similar to the one he sustained toward defendant at the time of his testimony. *Witty v. Traction Co.*, 429.

WORDS AND PHRASES.

1. **Words and Phrases: "Disorderly House:" Bawdy House.** To constitute a disorderly house there must be a continuation of the acts for a short time at least, and such acts must tend to promote disturbances or breaches of the peace or violation of the law or must promote immorality. A bawdy is a disorderly house *per se* and its maintenance is forbidden by statute. State *ex rel. v. Dykeman*, 416.
2. **Same: Unlawful: Willful.** The terms "unlawful" and "without right" are not synonymous with "willful." *Furnace Co. v. The Co.*, 442.

Rules Governing Practice in the Kansas City Court of Appeals.

It is ordered by the Court that the following Rules of Practice in the Kansas City Court of Appeals shall be in force and observed from and after the first day of April, 1885:

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court room and entertain and dispose of all oral motions.

RULE 2.—All motions in a cause shall be in writing, signed by the counsel and filed of record, and no motion shall be argued orally, unless the Court so directs.

RULE 3.—Hearing of Causes. No cause shall be heard before it is reached in its regular order on the docket, unless circumstances exist such as entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits, showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order. This rule has no application to causes whereof this Court has original jurisdiction.

RULE 4.—Taking Records from Clerk's Office. Counsel in a cause are permitted to take the records of such cause from the Clerk's office to the library room of the Court, and to no other place, and then they must leave a written receipt therefor, but shall not be retained from the Clerk's office over night.

RULE 5.—Diminution of Records. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party or his attorney, previous to the making of the application.

RULE 7.—Notices of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the Clerk of this Court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Review of Instructions on General Statement of Evidence. In actions at law it shall not be necessary, for the purpose of reviewing in this Court the action of any circuit court, or any other court having by statute jurisdiction of civil cases, in giving or refusing instructions, that the whole of the testimony given or excluded at the trial in the Court of first instance should be embodied in the bill of exceptions; but it shall be sufficient, for the purpose of such review, that the bill of exceptions should state that

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"evidence tending to prove" a particular fact or issue was given, and that an exception was saved to the giving or refusal of the instruction founded on it.

RULE 9.—Bill of Exceptions When General Statement of Evidence is Allowed by Trial Court. If the opposite party shall contend that there was no evidence tending to prove a fact or issue, and the Court of first instance shall be of opinion that there was such evidence, it shall be the duty of the Court to allow the bill of exceptions in the form stated in the last preceding rule, and then the other party shall be at liberty to set out in a bill of exceptions, to be prepared by him, the whole of the testimony supposed by him to be applicable to such fact or issue, and to except to the opinion of the Court that the same tends to prove such fact or issue.

RULE 10.—Evidence—Bill of Exceptions to be Allowed, When. If the court of first instance shall be of opinion that there is no evidence tending to prove a particular issue of fact, the party alleging that there is such evidence shall tender a bill of exceptions detailing all the evidence given and supposed to tend to the proof of such fact or issue, and except to the opinion of the Court that it does not so tend, which bill of exceptions shall be allowed by the Court by which the cause is tried.

RULE 11.—Exceptions—Questions to be Embodied in Bill. When an exception is saved to the admission or exclusion of any evidence, or the allowance or disallowance of any question, the question itself shall be stated in the bill of exceptions, or the substance of the evidence shall be fully stated.

RULE 12.—Duty of Circuit Court Clerks in Making Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had, in which an appeal is taken or writ of error is sued out, shall not (*unless an exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction in the cause*), in making out transcripts of the record for this Court, set out the original or any subsequent writ, or the return thereof, but in lieu thereof shall say (*e. g.*): "*Summons issued on the ——— day of ———, 188—, executed on the ——— day of ———, 188—;*" and if any pleading be amended the Clerk in making out transcripts will treat the last amended pleading as the only one of that order in the cause, and will refrain from setting out any abandoned pleadings as part of the record, unless it be made such by a bill of exceptions; and no Clerk shall insert in the transcript any matter touching the organization of the Court, or any mention of any continuance, motion or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 13.—Presumption that Bill of Exceptions Contains all the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in the cause, being that this Court may have before it the same matter which was decided by the

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court of first instance, it shall be presumed, as matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 14.—Bill of Exceptions in Equity Cases. In all cases of equitable jurisdiction the whole of the evidence shall be embodied in the bill of exceptions, unless the parties shall agree upon an abbreviated statement thereof.

RULE 15.—Abstract and Briefs to be Filed and Served. In all cases the appellant or plaintiff in error shall file with the Clerk of this court, on or before the day next preceding the day on which the cause is docketed for hearing, five copies of a printed abstract or abridgment of the record in said cause, setting forth so much thereof as is necessary to a full understanding of all the questions presented to this court for decision, together with a brief containing in numerical order, the points or legal propositions relied on, with citation of such authorities as counsel may desire to present in support thereof.

The appellant or plaintiff in error shall also deliver a copy of said abstract, brief, points and authorities to the attorney for respondent, or defendant in error, at least twenty days before the day on which the cause is docketed for hearing, and the counsel for respondent, or defendant in error, shall, at least eight days before the day the cause is docketed for hearing, deliver to the counsel for appellant, or plaintiff in error, one copy of his statement, brief, points and authorities cited, and such further abstract of the records as he may deem necessary, and shall, on or before the day next preceding the day on which said cause is docketed for hearing, file with the Clerk of this Court five copies of the same; and the counsel for appellant, or plaintiff in error, may, if he desires, within five days after the service on him of the respondent's, or defendant in error's, abstract and brief of aforesaid, file and serve a reply thereto in the manner aforesaid; and the evidence of the service of such abstracts, briefs, points and authorities, as above required, shall be filed by each party at the time of filing said copies with the Clerk.

RULE 16.—Citing Authorities in Briefs. In compliance with section 863, Revised Statutes 1899, the statement filed by the appellant shall consist of a clear and concise statement of the case without argument, reference to issues of law or repetition of testimony of witnesses. That statement shall be followed by the brief, which shall contain a statement of the points on which the appellant relies for a reversal of the judgment. In citing authorities in support of any proposition, it shall be the duty of counsel to give the names of the principal parties to any case cited from any report of adjudged cases as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the chapter, the section, the paging and side-paging shall be set forth. The respondent, in his statement, may

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adopt that of appellant; or, if not satisfied with such statement, he shall correct any errors therein. The purpose of this rule is to enable the court to be informed of the material facts of the case by the statements, without being compelled to glean them from the abstract of the record. Any statement not complying with this rule shall be disregarded.

RULE 17.—Appellant's Brief to Allege Errors Complained of. The brief on behalf of appellant or plaintiff in error shall distinctly and separately allege the errors committed by the inferior court, and no reference will be permitted in the oral argument to errors not thus specified, nor any reference by either counsel to any authority not cited in his brief, unless for good cause shown the Court shall otherwise direct.

RULE 18.—Penalty for Failure to Comply with Rule 15. If any appellant or plaintiff in error, in any civil cause, shall fail to comply with the provisions of rule numbered 15, the court, when the cause is called for hearing, will dismiss the appeal or writ of error, or, at the option of respondent or defendant in error, continue the cause, at the costs of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of Rule 15.

RULE 19.—Agreed Statement of the Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon and the exceptions saved to any ruling, which may intelligently present to this Court the matters intended to be reviewed, and this statement with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred at the trial of the cause, shall be treated as the record in this Court, and the judgment rendered in the court of first instance shall be affirmed or reversed, according to the opinion entertained by this Court respecting the same.

RULE 20.—Motion for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of a cause, and must be founded on papers showing clearly that some question decisive of the cause, and duly presented by counsel in their brief, had been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision to which the attention of the Court was not called. Such motion and statement must be filed within ten days after the delivery of the opinion, and a copy of the motion, with the accompanying statement or brief, shall be served upon the opposite counsel; but no motion for a rehearing shall be filed after the final adjournment of the Court.

RULE 21.—Motion for Affirmance. On motion for affirmance, under section 3717, Revised Statutes of 1879, as amended by act concerning Practice in Civil Cases, approved March 24, 1883, the mere fact that the appellant has on file, or presents a copy of the

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transcript, at the time such motion is made, shall not of itself be deemed good cause within the meaning of said law.

Rule 22.—Extending Time for Filing Statements, Abstracts, Etc. In no case will extension of time for filing statements, abstracts and briefs be granted, except upon affidavit showing satisfactory cause.

Rule 23.—Oral Arguments. When a cause is called for argument, the appellant, or plaintiff in error, will make a statement of the cause prepared by him; the defendant in error, or respondent, will thereupon read his statement, in each case without comment of any kind. The plaintiff in error, or appellant, will then proceed to argue for a reversal or modification of the judgment of the court below; the defendant in error, or respondent, will answer him; and the appellant, or plaintiff in error, will reply and close the argument. The whole time consumed by either side, in this statement and argument, shall not exceed *sixty minutes*, unless the Court, for cause shown before the commencement of the argument in any particular case, shall otherwise order. Cross-appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument. Counsel will not be permitted in any case to read to the Court a written or printed argument.

Rule 24.—Notice on Motion to Dismiss or Affirm. A party in any cause filing a motion, either to dismiss an appeal or writ of error or to affirm the judgment of the trial court, shall first notify the adverse party or his attorney of record, at least twenty-four hours before making the motion, by telegraph, by letter, or by written notice, and shall, on filing such motion, satisfy the Court that such notice has been given.

Rule 25.—When Appeal is Returnable—Certificate of Judgment—Transcript. In all cases where appeals shall be taken or writs of error sued out to this court after September 1, 1903, the appellant shall file with the clerk of this court a full transcript or in lieu thereof a certificate of judgment as provided by section 813, Revised Statutes 1899, within the time by said section provided, and the date of the allowance of the appeal *and not the time of filing the bill of exceptions after the appeal is granted*, shall determine the term of this court to which such appeal is returnable; and when the appellant for any reason cannot or does not file a complete transcript, he shall file, within the time allowed by said section of the statutes, a certificate of judgment, and may thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. And neither the fact that this court has heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for the return term shall be taken as an excuse, but in all such cases the appellant shall file a certificate of the judgment as and when required by said section 813, Revised Statutes 1899.

Attest:

L. F. McCOY, Clerk.

Rules of Practice in the St. Louis Court of Appeals.

REVISED JULY 20, 1909.

TO BE IN FORCE AUGUST 15, 1909.

Rule 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the Court Room.

Rule 2.—Words Appellant and Respondent, What They Include. Whenever the words appellant or respondent appear in these rules they shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

Rule 3.—Motions. All motions in a cause shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court first had, or unless the court, of its own motion, directs oral argument thereon.

Rule 4.—Hearing of Causes. Except in causes whereof this Court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless in the opinion of the Court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the Court shall otherwise order.

Rule 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the Court after joinder in error, except by consent of parties.

Rule 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The Court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript, when the transcript of the record is formally insufficient.

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Rule 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

Rule 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove, then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

Rule 9.—Bills of Exceptions in Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided further that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done and at the same time preserve the full force and effect of the evidence.

Rule 10.—Duty of the Clerk in Making Up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the Court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.) "Summons issued on the _____ day of _____ 190—, executed on the _____ day of _____, 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading nor caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

Rule 11.—Presumption That Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

Rule 12.—Abstracts in Lieu of Transcripts; When Filed and Served. In those cases where the appellant shall, under the provisions of section 813, Revised Statutes of 1899, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall make and deliver to the respondent a copy of his abstract at least thirty days before the cause is set for hearing. If the respondent is not satisfied with such abstract, he shall, at least fifteen days before the cause is set for hearing, deliver to the appellant a complete or additional abstract. Objections to this complete or additional abstract may be made and served on opposing counsel within ten days after service of such abstract upon the appellant. Six copies of the abstracts above referred to and of any

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objections thereto shall be filed with the clerk not later than one (1) day before the cause is docketed for hearing.

Adopted November 4, 1909.

Rule 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule and dispense with the necessity of any further transcript.

Rule 14.—Abstracts—When Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least thirty days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

Rule 15.—Abstracts, What They Shall Contain. Abstracts shall be printed in fair type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the questions and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Rule 16.—When Appeal is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after August 1, 1908, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 813, Revised Statutes 1899, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section a certificate of the judgment and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record. Neither the fact that the Supreme Court nor this Court have heretofore held that the return term of the appeal is to be determined by the date of the filing of the bill of exceptions, nor the fact that for any reason a complete transcript could not be filed in time for

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the return term shall serve as an excuse for failure to comply with this rule, but in all such cases the appellant shall file a certificate of the judgment as and within the time required by said section 813.

Rule 17.—Costs, When Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 813, Revised Statutes 1899, which fails to make a full presentation of all the record necessary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

Rule 18.—Briefs, What to Contain and When Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least five days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service, and such evidence of service must be filed in this court with the abstract or brief.

Rule 19.—Citing Authorities in Brief. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

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Authorities incorrectly cited as to book, page or title of case. will be disregarded.

Rule 20.—Extension of Time. Hereafter in no case will extensions of time for filing statements, abstracts or briefs be granted, except upon affidavit showing satisfactory cause.

Rule 21.—Penalty for Failure to Comply With Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause, shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court when the cause is called for hearing, will dismiss the appeal, or writ of error, or at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

Rule 22.—Agreed Statement of Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligibly present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

Rule 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be delivered, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. See *Barnett et al. v. Colonial Hotel B. Co.*, 119 S. W. 471; 137 Mo. App. 636.

Rule 24 is hereby amended to read as follows:

Rule 24—Oral Arguments. When a cause is called for argument, the appellant will make his statement and proceed with his argument; the respondent will thereupon make his statement and proceed with his argument, the appellant replying, if he desires, and if he has not consumed all of his time in opening. The whole time consumed by either party in statement and argument shall not exceed sixty (60) minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order: *Provided*, however, that the court may, in its discretion shorten the time for argument in any case; and *provided* further, that in appeals in causes originating before a Justice of the Peace, the time for argument shall not exceed thirty (30) minutes on each side.

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Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

When two or more cases are heard together, the court, in its discretion, will allot the time to be given for argument.

Unless by permission of the court, counsel will not read to the court *in extenso* the written or printed argument on file, nor from reports or text books.

The above rule to be in force and effect on and after June 6, 1910.

Rule 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, by telegram, by letter or by written notice, personally served, of his proposed proceeding. When said adverse party or his attorney of record resides in the City of St. Louis, such notice shall be given at least twenty-four hours before the time appointed for the hearing of the motion; when the adverse party or his attorney of record resides outside the City of St. Louis, twenty-four hours' notice for each fifty miles and fraction over twenty-five miles, shall be given; and in all cases the court will require satisfactory proof that proper notice has been given.

Rule 26.—Motion for Affirmance. On motion for affirmance under section 812, Revised Statutes 1899, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

Rule 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the appellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

Rule 28.—Allowance to Garnishees. Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

Rule 29.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attor-

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ney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

Rule 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

Rule 31.—Withdrawing Records. No record in any cause shall be taken from the clerk's office, except on written order of one of the judges of this court, which may be given to counsel in the cause for the purpose of having a copy or abstract thereof printed, and upon counsel receipting for the same and agreeing to return it within a time specified in the order by the judge or by the clerk of this court.

Rule 32.—Repeal of Former Rules. All former rules not included herein as above, are hereby repealed; and the foregoing rules shall be in effect on and after August 15, 1909: Provided, however, that the rules now in force as to abstracts and briefs and the time and manner of filing and service thereof, shall govern in all cases on the docket for October, November and December, 1909, which are then submitted.

Adopted July 20, 1909.

Rule. 33.—In order to avoid disposing of appeals on points of appellate procedure and mainly the insufficiency of abstracts of record, and to facilitate, instead, the disposition of appeals on their merits, this rule is adopted to take effect August 1, 1910.

If in any case a respondent wishes to question the sufficiency of the appellant's abstract of the record, he shall file his objections in writing in the office of the clerk of this court within ten days after a copy of said abstract of the record has been served upon him, and in said writing shall distinctly specify the supposed defects and insufficiencies of the said abstract. The appellant shall be served by the respondent with a copy of the objections on or before the day they are filed with the clerk. If the respondent shall omit to file written objections to the appellant's abstract within said time so that this court may pass upon them before the appeal is submitted for decision, the court will, if it deems proper, disregard any objection to said abstract thereafter made by the respondent. In order to enable this court to pass on such objections to the appellant's abstract, the appellant shall, immediately, on being served with a copy thereof, file at least one copy of his abstract with the clerk of this court and also his answer, if any he has, to the respondent's objections.

RULES OF PRACTICE

IN THE

SPRINGFIELD COURT OF APPEALS.

Adopted August 19, 1909.

RULE 1.—Presiding Judge. The Presiding Judge shall superintend all matters of order in the court room.

RULE 2.—Words Appellant and Respondent, what they include. Whenever the word appellant or respondent appear in these rules it shall be taken to mean and include plaintiff or defendant in error, or other parties occupying like positions in a cause, and when the term appeal is used it shall be held to include writs of error, unless the contrary appears.

RULE 3.—Motions. All motions shall be in writing, signed by counsel, and filed with the clerk of the court. No paper shall be received or filed by the clerk in any cause pending in this court, unless indorsed with the names of one or more of the parties, appellant or respondent, the general nature of the motion, and the name of the counsel tendering it. The clerk will enter on the clerk's motion docket, and also on the motion docket of the court, all motions filed, as well as the date of filing, immediately on filing thereof. No motion shall be argued orally, unless by leave of court.

RULE 4.—Hearing of Causes. Except in causes whereof this court has original jurisdiction, no cause shall be heard before it is reached in its regular order on the docket, unless, in the opinion of the court, circumstances exist which entitle it to precedence; and any motion to advance a cause on the docket shall be accompanied by affidavits showing particularly the facts on which such motion is based. When a cause is advanced, the record, as well as the briefs, shall be printed, unless the court shall otherwise order.

RULE 5.—Diminution of Record. No suggestion of diminution of record in civil cases will be entertained by the court after joinder in error, except by consent of parties.

RULE 6.—Certiorari to Perfect Record. Whenever a writ of certiorari to perfect record is applied for, the motion shall state the defect in the transcript which it is designed to supply, and shall be verified by affidavit. At least twenty-four hours' notice shall be given to the adverse party, or his attorney, previous to making the application. The court may of its own motion, at any time, require the clerk of the trial court to send up a complete transcript.

RULE 7.—Notice of Writs of Error. All notices of writs of error, with the acceptance, waiver or return of service indorsed thereon, shall be filed with the clerk of this court, and by him attached to the transcript in the cause, and shall be the only evidence that such notice has been given.

RULE 8.—Reviewing Instructions. For the purpose of reviewing the action of the trial court in giving and refusing instructions, it shall not be necessary to set out the evidence in the bill of exceptions; but it shall be sufficient to state that there was evidence tending to prove the particular fact or facts. If the parties disagree as to what fact or facts the evidence tends to prove,

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then the evidence of the witnesses may be stated in a narrative form, avoiding repetition and omitting all immaterial matter.

RULE 9.—Bills of Exceptions in Equity Cases. In cases of equitable jurisdiction, the whole of the evidence shall be embodied in the bill of exceptions; provided that it shall be sufficient to state the legal effect of documentary evidence where there is no dispute as to the admissibility or legal effect thereof; and provided, further, that parol evidence, whether given orally in court or by deposition, may be reduced to a narrative form where this can be done, and at the same time preserve the full force and effect of the evidence.

RULE 10.—Duty of the Clerk in Making up Transcripts. The clerks of the several circuit courts and other courts of first instance, before which a trial of any cause is had in which an appeal is taken (unless exception is saved to the regularity of the process or its execution, or to the acquiring by the court of jurisdiction of the cause), in making out transcripts of the record for this court, shall not set out the original or any subsequent writ, or the return thereof; but in lieu thereof shall say (e. g.): "Summons issued on the — day of — 190—, executed on the — day of — 190—;" and if any pleading be amended, the clerk in making out transcripts, will treat the last amended pleading as the only one of that class in the cause, and shall not set out any abandoned pleading or caption or notices or certificates to depositions, nor insert in the transcript any matter touching the organization of the court, or any order of continuance, or any motion, or affidavit in the cause, unless the same be specially called for by bill of exceptions.

RULE 11.—Presumption that Bill of Exceptions Contains All the Evidence. The only purpose of a statement in a bill of exceptions, that it sets out all the evidence in a cause, being that this court may have before it the same matter which was decided by the trial court, it shall be presumed as a matter of fact, in all bills of exceptions, that they contain all the evidence applicable to any particular ruling to which exception is saved.

RULE 12.—Abstracts in Lieu of Transcripts when Filed and Served. In those cases where the appellant shall, under the provisions of section 813, Revised Statutes of 1899, file in this court a copy of the judgment, order or decree, in lieu of a complete transcript, he shall deliver to the respondent a copy of his abstract, at least thirty days before the cause is set for hearing, and shall in like time file six copies thereof with the clerk of this court. If the respondent is not satisfied with such abstract, he shall deliver to the appellant a complete or additional abstract at least fifteen days before the cause is set for hearing, and within like time file six copies thereof with the clerk of this court. Objections to such complete or additional abstracts shall be filed with the clerk of this court within ten days after service of such abstract upon the appellant, and a copy of such objections shall be served upon the appellant in like time.

RULE 13.—Printed Transcripts. A printed and indexed transcript duly certified by the clerk of the trial court may be filed instead of a manuscript record, and in all cases six printed and indexed uncertified copies of the entire record filed and served within the time prescribed by these rules for serving abstracts, shall be deemed a full compliance with this rule, and dispense with the necessity of any further transcript.

RULE 14.—Abstracts, when Filed and Served. In all cases where a complete written or printed transcript is brought to this court in the first instance, the appellant shall make and deliver to respondent a copy of his abstract of the record at least twenty

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days before the day on which the cause is set for hearing, and file six copies thereof with the clerk of this court not later than the day preceding the one on which the case is set for hearing. If the respondent desires to file a further or additional abstract, he shall deliver to the appellant a copy thereof at least five days before the cause is set for hearing, and file six copies thereof with the clerk of this court on the day preceding that on which the cause is to be heard.

RULE 15.—Abstracts, What They Shall Contain. Abstracts shall be printed in not less than ten point (long primer) type, and shall be paged and have a complete index at the end thereof, and shall set forth so much of the record as is necessary to a full and complete understanding of all the questions presented to this court for decision. Where there is no question made over the pleadings, or over deeds or other documentary evidence, it shall be sufficient to set out the substance of such pleadings or documentary evidence. The evidence of witnesses shall be stated in a narrative form, except when the question and answers are necessary to a complete understanding of the evidence. When there is any question made concerning the pleadings, or the admissibility or legal effect of any documentary evidence, the pleadings and such documentary evidence must be set out in full with the indorsements thereon; and in all other matters the abstract must set forth a copy of so much of the record as is necessary to be consulted in the disposition of the errors assigned.

Provided: In all cases wherein there are statements or other evidence in the printed abstracts of the record (including the bill of exceptions) tending to show the filing in proper time, of the motion for new trial, or in arrest of judgment, or affidavit for appeal, and any statement that the bill of exceptions was signed, sealed or made a part of the record will be taken to be a statement that said bill of exceptions was signed, sealed and filed and made a part of the record at the proper time and in the proper manner, such abstracts shall be deemed sufficient as to any of the aforesaid matters, and in motions challenging the sufficiency of the abstract as to such matters, it will not be a sufficient objection to state that the abstract does not show such steps were taken in proper time or in a proper manner, but the motion must specifically allege that as a matter of fact such steps were not taken at all, or not in proper time or in proper manner, as the case may be, and thereupon, the Court shall determine the matter and the costs thereof shall be taxed as the Court shall deem just. (Amended January 3, 1911, to take effect February 1, 1911.)

RULE 16.—When Appeal is Returnable; Certificate of Judgment; Transcript. In all cases where appeals shall have been taken or writs of error sued out to this court after October 1, 1909, the appellant shall file with the clerk of this court a full transcript, or in lieu thereof, a certificate of the judgment as provided by section 813, Revised Statutes 1899, within the time designated in said section, and the date of the allowance of the appeal, and not the time of filing the bill of exceptions after the appeal is granted, shall determine the term of this court to which such appeal is returnable. When the appellant, for any reason, cannot or does not file a complete transcript, he shall file, within the time allowed by said section, a certificate of the judgment, and shall thereafter file a complete transcript and abstract of the record, or simply an abstract of the record.

RULE 17.—Costs, when Allowed for Printing Abstracts and Records. Costs will not be allowed either party for any abstracts filed in lieu of a full transcript under section 813, Revised Statutes 1899, which fails to make a full presentation of all the record nec-

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essary to be considered in disposing of all the questions arising in the cause. In those cases brought to this court by a copy of the judgment, order or decree, instead of on a full transcript, and in which the appellant shall file in this court a printed copy of the entire record, as and for an abstract, costs may be allowed for printing the same.

In any case in which a manuscript record has been or may hereafter be filed in this court, a reasonable fee for printing an abstract of the record, or the entire record, may be taxed as costs upon the written stipulation of both parties to that effect. The affidavit of the printer shall be received in every case, where costs may properly be taxed for printing, as *prima facie* evidence of the reasonableness thereof; and if the adverse party objects thereto, such objection shall be filed within ten days after service of notice of the amount of such charge. Not exceeding sixty-five cents a printed page will be allowed in any case for printing abstracts or transcripts.

RULE 18.—Briefs, what to Contain and when Served. The appellant shall deliver to the opposing party a copy of his brief thirty days before the day on which the cause is set for hearing, and the respondent shall deliver a copy of his brief to the opposing party at least ten days before the last named date, and the appellant shall deliver a copy of his brief in reply to the opposing party not later than the day preceding that on which the cause is set for hearing, and six copies of each brief shall be filed with the clerk on or before the last named date.

All briefs shall be printed in not less than ten point (long primer) type, and shall contain separate and apart from the argument or discussion of authorities, a statement, in numerical order, of the points relied on, together with a citation of authorities, appropriate under each point. Any brief failing to comply with this rule may be disregarded by the court.

The brief filed by appellant shall distinctly and separately allege the errors committed by the trial court, and no reference will be permitted at the argument to the errors not thus specified, unless for good cause shown this court shall otherwise direct.

Delivery of an abstract or brief to the attorney of record of the opposing party shall be deemed a delivery to such party under the foregoing rules, and the evidence of such delivery must be by the written acknowledgment of such opposing party or his attorney, or by the affidavit of the person making the service; and such evidence of service must be filed in this court with the abstract or brief.

RULE 19.—Citing Authorities in Briefs. In citing authorities in support of any proposition, it shall be the duty of counsel to give names of the principal parties to any case cited from any report of adjudged cases, as well as the number of the volume and the page where the same will be found; and when reference is made to a passage in any elementary work or treatise, the number of the edition, the volume, the section, the paging or side paging shall be set forth.

RULE 20.—Extension of Time. In no case will extension of time for filing statements, abstracts, or briefs be granted except upon affidavit showing satisfactory cause.

RULE 21.—Penalty for Failure to Comply with Rules 12, 14, 15, 16 and 18. If any appellant in any civil cause shall fail to comply with the provisions of rules 12, 14, 15, 16 or 18, the court, when the cause is called for hearing, will dismiss the appeal, or writ of error, or, at the option of the respondent, continue the cause at the cost of the party in default. No oral argument will be heard from any counsel failing to comply with the provisions of rule 18, unless said counsel is prevented from doing so by failure of opposing counsel.

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RULE 22.—Agreed Statement or Cause of Action. Parties may, in the courts of first instance, agree upon any statement of the cause of action, the defense and the evidence, together with the rulings of the court thereupon, and the exceptions saved to any rulings, which intelligently present to this court the matters intended to be reviewed; and this statement, with a certificate by the judge before whom the cause was tried, that the same is a substantial history of what occurred, at the trial of the cause, shall be treated as the record in this court.

RULE 23.—Motions for Rehearing. Motions for rehearing must be accompanied by a brief, printed or typewritten, statement of the reasons for a reconsideration of the cause, and must be founded on papers showing clearly that some question decisive of the case, and duly submitted by counsel, has been overlooked by the court, or that the decision is in conflict with an express statute, or with a controlling decision of the Supreme Court, or with a decision of one of the other Courts of Appeals; and the question so submitted by the counsel and overlooked by the court, or the statute with which the decision conflicts, or the controlling or conflicting decision, as the case may be, must be distinctly and particularly set forth in the motion, otherwise the motion will be disregarded. Such motion must be filed within ten days after the opinion of the court shall be filed, and notice of the filing thereof must be served on the opposite counsel. After a cause has been once reheard, and the motion for rehearing overruled, no further motion for rehearing or motion to set aside the order overruling the motion for rehearing, by the same party, will be entertained by the court or filed by the clerk, nor will any motions to certify the case to the Supreme Court be filed or entertained. At the time of filing of such motion for rehearing, four copies thereof and four copies of the brief in support thereof shall be deposited with the clerk. (Amended to take effect August 1, 1910.)

RULE 24.—Oral Arguments. When a cause is called for argument, the appellant will state the cause and proceed with his argument; the respondent will thereupon make his statement of the cause and proceed with his argument, the appellant in error replying if he desires, provided he has not consumed all of his time in opening. The whole time consumed by either party in the statement and argument shall not exceed sixty minutes, unless the court, for cause shown, and on application made before the commencement of the argument in the case, shall otherwise order.

Cross appeals shall be treated as one cause, and the plaintiff in the trial court shall be entitled to open and close the argument.

RULE 25.—Notice on Motion to Dismiss or Affirm. A party in any cause, desiring to present a motion either to dismiss an appeal or writ of error, or to affirm the judgment of the trial court, shall notify the adverse party, or his attorney of record, in writing, of his intention to file said motion at least five days before the same is filed, and shall accompany said notice with a copy of said motion, and in all cases the court will require satisfactory proof that proper notice has been given.

RULE 26.—Motion for Affirmance. On motion for affirmance under section 812, Revised Statutes 1899, the mere fact that the appellant has on file, or presents a copy of the transcript, at the time such motion is made, shall not, of itself, be deemed good cause within the meaning of said law.

RULE 27.—Appearance of Counsel. The counsel who represent the parties in the trial court, in any cause coming to this court, will be held to represent the same parties, respectively, in this court; but should other counsel be engaged or retained in the cause, they must enter their appearance in writing, the counsel for the ap-

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pellant ten days, and the counsel for the respondent five days before the first day of the term to which the appeal or writ of error is returnable; and if counsel are employed after said time, their appearance must be entered as soon as they are retained. Counsel failing to comply with this rule will not be recognized in a cause, unless the consent, in writing, of the counsel of the opposite party to such appearance be filed with the clerk ten days before the day on which the cause is set for hearing. Appearance may be entered by written notice to the clerk of this court, giving the name and address of the counsel. Additional counsel may enter their appearance at any time before the cause is called for hearing.

RULE 28.—Allowance to Garnishees.—Garnishees claiming any allowance in this court must do so on or before a final submission of the cause on briefs. They shall accompany the claim for allowance with a sworn statement of expenditures paid or incurred upon the appeal.

RULE 29.—Service of Abstracts and Briefs in Criminal Cases. The attorneys for appellants, in criminal cases in which transcripts have been filed in the office of the clerk of this court sixty days before the day the cause is docketed for hearing, shall, at least thirty days before the day of hearing, file in the office of the clerk of this court a printed statement, containing apt references to the pages of the transcript, assignment of errors and brief of points and argument, and serve a copy thereof upon the attorney acting as prosecuting officer in the trial court or his successor in office, and thereupon, such attorney, shall, fifteen days before the day of trial, serve defendant or his counsel with a copy of his statement and brief.

When a criminal case shall be advanced on the docket, the court shall designate the time for filing statements and briefs.

When appellants have been allowed to prosecute their appeals as poor persons, by the trial court, counsel will be permitted to file typewritten briefs and statements. In cases in which the transcript has been filed thirty days before the day on which the cause is docketed, counsel for appellant shall file their statements, briefs, and assignments of error fifteen days before the hearing, and the prosecuting officer, his brief and statement five days before the hearing.

RULE 30.—Return of Original Writs. Original writs or other process issued by the court, or by any judge in vacation, may be made returnable to the court as such judge in vacation may order.

RULE 31.—Withdrawing Records. No record or any of the files in a cause shall be taken from the clerk's office, but any party interested may make a copy of any record in the clerk's presence.

Adopted this 19th day of August, 1909.

